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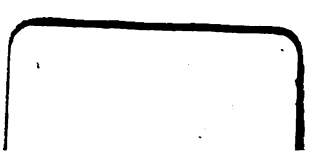

JSN
JAM
NYK

v. 1

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Common Pleas

AND

Exchequer Chamber,

WITH

TABLES OF THE NAMES OF THE CASES AND PRINCIPAL MATTERS.

BY

JOHN BAYLY MOORE, Esq., of the Inner Temple,

AND

JOSEPH PAYNE, Esq., of Lincoln's Inn,

BARRISTER AT LAW.

VOL. I.

CONTAINING THE CASES FROM MICHAELMAS TERM, 8 GEO. IV. 1827,

TO

EASTER TERM, 9 GEO. IV. 1828, BOTH INCLUSIVE.

LONDON:

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JUDGES

OF THE

COURT OF COMMON PLEAS,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Hon. Sir Wm. Draper Best, Knt., Lord Chief Justice.
The Hon. Sir James Allan Park, Knt.
The Hon. Sir James Burrough, Knt.
The Hon. Sir Stephen Gaselee, Knt.

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ERRATA.

Page 22, in marginal note, for "*defence*," read "*defect*."
—— 195, ——————, for "49 *Geo.* 3," read "47 *Geo.* 3."
—— 439, in note, for "13 *Geo.* 3, c. 64," read "13 *Geo.* 3, *c.* 63."
—— 483, ———, before "*Edit.*," insert "3*d*."
—— 515, in marginal note, for "*no*," read "*not*."
—— ——, ——————, (last line but one), for "*vendor*," read "*vendee*."
—— 574, ——————, after "*could*," insert "*not*."
—— 670, ——————, transpose "*plaintiff*," and "*defendant*."

CASES

ARGUED AND DETERMINED

IN THE

Courts of Common Pleas

AND

Exchequer Chamber,

IN MICHAELMAS TERM,

IN THE EIGHTH YEAR OF THE REIGN OF GEORGE IV.

MEMORANDA.

IN the course of the last vacation, Sir *Anthony Hart*, Knight, Vice Chancellor of *England*, was appointed Lord High Chancellor of *Ireland*, on the resignation of the Right Honourable Lord *Manners;* and *Lancelot Shadwell*, Esq., one of his Majesty's counsel learned in the law, was appointed to succeed Sir *Anthony Hart*, as Vice Chancellor, and took his seat accordingly, on *Friday*, the 2d *November*.

On the first day of this Term, *Charles Frederick Williams*, Esq., *William Selwyn*, Esq., and the Honourable *Thomas Erskine*, all of *Lincoln's Inn*, who had in the course of the vacation been appointed his Majesty's counsel learned in the law, took their seats within the bar.

Lord Chief Justice *Best* was prevented from attending in Court during the whole of this Term, by severe indisposition.

1827.

Wednesday, Nov. 7th.

ROWLES, Demandant; BOWLY, Tenant.

THIS was a writ of right. Mr. Serjeant *Bosanquet*, on the last day of the last Term, obtained a rule, calling on the demandant to shew cause why the writ of *grand cape*, which had been sued out in the cause, might not be set aside for irregularity. He founded his motion on an affidavit of the agent for the tenant, which stated, that in the last *Trinity* vacation the demandant commenced an action against the tenant by a writ of *entry sur abatement*, for the recovery of divers messuages, lands, and hereditaments, in the county of *Gloucester*, to which the demandant claimed title as the heir-at-law of one *Robert Sandford*, deceased. That the cause came on for trial at the last Assizes for that county, when, after a full investigation into the facts and circumstances attending the execution of the will of *Sandford*, under which, and subsequent mesne conveyances, the tenant claimed the said messuages, &c., a verdict was found for the tenant; the validity of the will being fully and satisfactorily established; and no attempt was afterwards made on the part of the demandant to set aside or call in question that verdict. That the demandant had since commenced proceedings, in a new action against the tenant, by writ of right, for the recovery of the same hereditaments which were sought to be recovered in the first action. That upon the return of the summons issued on the writ of right, which was entitled on the morrow of the *Ascension* in *Easter* Term, 8 *Geo.* 4, being the 25th day of *May* last, the tenant entered an essoin in the action. That on the 28th of *May*, the demandant adjourned the essoin until the *second* return after the return of the said writ of right, *viz.*, "in eight days of the *Holy Trinity*;" whereas by the statute 24 *Geo.* 2, c. 48, the demandant ought to have adjourned the essoin until "in fifteen days of the *Holy Trinity*." That a rule, on the

By the statute 24 *Geo.* 2, c. 48, s. 3, the demandant, in a writ of right, must adjourn the tenant's essoin to the *third* return. Where, therefore, a demandant adjourned the essoin to the *second* instead of the *third* return, and the tenant entered a rule with the clerk of the essoins, that, "unless the demandant adjourned the essoin to the *third* return, a *non pros.* would be entered;" and after the time to which the essoin ought to have been adjourned, the tenant entered a *ne recipiatur*, and signed judgment of *non pros.*, and a writ of *grand cape* was issued in the action, by the demandant, on the same day, but shortly after, the judgment had been so signed:—The Court set aside the writ for irregularity.

1827.

ROWLES, Demandant; BOWLY, Tenant,

part of the tenant was entered, with the clerk of the essoins, on the 14th *June* last, entitled, "on the morrow of the *Ascension*, in *Easter* Term, in the 8th year of the reign of *Geo.* 4th," stating, that, "unless the demandant adjourned the essoin to fifteen days of the *Holy Trinity*, a *non pros.* would be entered by the tenant." That the demandant did not adjourn the essoin "until in fifteen days of the *Holy Trinity*," pursuant to the said statute and rule; and that, in consequence thereof, and after the time to which the essoin ought to have been so adjourned, *viz.* on the 26th *June* last, a *ne recipiatur* was entered against the demandant's claiming to adjourn the tenant's essoin; and judgment of *non pros.* was signed by the tenant. That after the attorney for the demandant had been informed that the judgment of *non pros.* had been signed, he told the agent for the tenant, that a writ of *grand cape* had been issued in the action, and was sent down to the Sheriff of *Gloucester;* and that the agent thereupon searched at the filazer's office, for the *præcipe* for the said writ of *grand cape*, and found that such *præcipe* was dated the 26th of *June*, as the day on which the writ was issued, and that he was informed by the filazer, that the writ of *grand cape* was not issued until after the opening of the office on the said 26th of *June*, and that the office does not open until 11 o'clock in the morning, previous to which time the *ne recipiatur* had been entered, and judgment of *non pros.* signed.

The learned Serjeant submitted, that the writ of *grand cape* had been irregularly issued, on two grounds: *first*, there having been no regular adjournment of the tenant's essoin, according to the statute 24 *Geo.* 2, c. 48, s. 3 (*a*),

(*a*) Which, for the more speedy proceeding in writs of *dower unde nihil habet*, and writs of entry for common recoveries to be sued and prosecuted by writs of entry or writs of right of advowson, *and in all other real actions*, enacts, That, after the feast of Saint *Michael* the Archangel, 1752, if any writ in any such ac-

1827

ROWLES, Demandant; BOWLY, Tenant.

by which the essoin must be adjourned by the demandant to the fourth return, both inclusive; and as the writ was returnable on the morrow of the *Ascension*, the adjournment should have been to fifteen days of the *Holy Trinity*; and, *secondly*, that the judgment of *non pros.* was regularly signed by the tenant, previously to the issuing of the writ.

Mr. Serjeant *Russell* now shewed cause, and submitted, that, under the circumstances, the judgment of *non pros.* had been signed by trick and contrivance; and that, as it had been improperly obtained, the tenant could not avail himself of the objection as to the improper adjournment of the essoin to the second instead of the third return in the last Term, *viz.*, in fifteen days of the *Holy Trinity*, which was on the 24th of *June*, two days after which the writ of *grand cape* was issued. The learned

tion come in, and be returnable in his Majesty's Court of *Common Pleas* in the day of the return of the morrow of *All Souls*, then day shall be given in fifteen days of Saint *Martin*; if on the morrow of Saint *Martin*, then in eight days of Saint *Hilary*; if in eight days of Saint *Martin*, then in fifteen days of Saint *Hilary*; if in fifteen days of Saint *Martin*, then on the morrow of the *Purification*; if in eight days of Saint *Hilary*, then in eight days of the *Purification*; if in fifteen days of Saint *Hilary*, then in fifteen days of *Easter*; if on the morrow of the *Purification*, then in three weeks from the day of *Easter*; if in eight days of the *Purification*, then in one month from the day of *Easter*; if in fifteen days of *Easter*, then in five weeks from the day of *Easter*; if in three weeks from the day of *Easter*, then on the morrow of the *Ascension* of our Lord; if in one month from the day of *Easter*, then on the morrow of the *Holy Trinity*: if in five weeks from the day of *Easter*, then in eight days of the *Holy Trinity*; *if on the morrow of the Ascension of our Lord, then in fifteen days of the Holy Trinity*; if on the morrow of the *Holy Trinity*, then in three weeks from the day of the *Holy Trinity*; if in eight days of the *Holy Trinity*, then on the morrow of *All Souls*; if in fifteen days of the *Holy Trinity*, then on the morrow of Saint *Martin*; if in three weeks of the *Holy Trinity*, then in eight days of Saint *Martin*.

1827.

ROWLES, Demandant; BOWLY, Tenant.

Serjeant produced affidavits to shew, that the tenant's agent did not inform the demandant that judgment of *non pros.* had been signed until three days after the writ of *grand cape* had been sued out; that the tenant did not enter the rule with the clerk of the essoins, to adjourn the essoin, according to the statute, until the 14th *June;* and that the demandant had no notice of such rule, which was entitled on the morrow of the *Ascension, viz.*, the 25th *May.* As, therefore, the rule was kept concealed from the demandant, and entered clandestinely, and the judgment of *non pros.* improperly signed, the writ of *grand cape* cannot be set aside; for the tenant could not be entitled to sign such judgment, without notice of the rule having been first given by him to the demandant, to adjourn the essoin. Mr. Serjeant *Williams*, in a note to the case of *William* v. *Gwyn* (*a*), states, that "on the fourth day after the return of the writ, the tenant may enter an essoin with the clerk of the essoins, but it must be in person, and not by attorney; the essoin must then be adjourned by the demandant, who will otherwise be *non-prossed* if the tenant enter a *ne recipiatur* with such clerk, and give a rule to the demandant to adjourn the essoin;" and in *Roscoe on Real Actions* (*b*), the same rule is laid down. Besides, the *ne recipiatur* was entered on the same day the judgment of *non pros.* was signed: and in *Barclay* v. *Earle* (*c*), where judgment of *non pros.* was signed for not adjourning an essoin cast upon a special *capias*, and the plaintiff took no notice of it, but delivered his declaration; and after the rule to plead was out, and a plea called for, signed judgment:—on a motion by the defendant, to set aside the judgment, on the ground, that, after a *non pros.* signed, the plaintiff was out of Court, as to all purposes but moving to set it aside,—the Court, considering it a trick,

(*a*) 2 Wms. Saund. 45 *e*, n. 4. (*b*) Vol. 1, p. 162,
(*c*) 2 Str. 1194.

1827.

ROWLES, Demandant; BOWLY, Tenant.

declared, that, as there was no colour for the essoin, or to expect a plaintiff to search after a *non pros.* and as there was no notice given of it, the plaintiff was right in going on; and they, therefore, refused to set it aside: and in *Williams' Saunders* (*a*), it is said, "if the tenant do not appear on the return of the *grand cape*, and plead something to excuse his default, strictly speaking, the land is lost for ever; but if he do appear, the demandant may release the default of not appearing at the return of the summons; and it is the usual practice to do so." As, therefore, the tenant did not give the demandant notice that the rule to adjourn the essoin had been entered with the clerk of the essoins, or that he had signed judgment of *non pros.* the writ of *grand cape* cannot be set aside, but it must, under the circumstances, be inferred that it was regularly sued out.

Mr. Serjeant *Bosanquet*, in support of the rule.—No trick whatever has been practised on the part of the tenant or his agent; and it is quite clear, that the demandant adjourned the essoin contrary to the provision of the statute *24 Geo. 2.* It is sworn that a *ne recipiatur* was not entered until after the day to which the essoin ought to have been adjourned. The demandant has not denied that the judgment of *non pros.* was signed before the writ of *grand cape* was issued; and as there has been no regular or proper adjournment of the essoin, without which the writ could not be sued out, it is clearly irregular, and must be set aside. This case is altogether distinguishable from that of *Barclay* v. *Earle*, as the question there turned on a trick and contrivance by the defendant, as an essoin could not be cast on a special *capias*; but here the demandant cannot excuse himself, as he might have known, and ought to have complied with, the terms of the statute.

(*a*) Vol. II. p. 245 *f.*

1827.

ROWLES, Demandant; BOWLY, Tenant.

Mr. Justice PARK.—This is an application to set aside a writ of *grand cape* which has been sued out at the instance of the demandant. Two grounds have been relied on in support of the motion;—the *first*, that there has been no regular adjournment of the tenant's essoin; and the *second*, that the latter signed judgment of *non pros.* before the writ was issued. The demandant should have applied to set aside that judgment before the writ was sued out. It has been said, that the judgment was signed by trick, and that the demandant had no notice of the rule to adjourn the essoin. If it were necessary for the tenant to communicate that circumstance to the demandant, there might be some weight in the objection; but it appears, that it was duly entered, and the demandant might have ascertained the fact, by making an application to the clerk of the essoins, before he issued his writ; which I think he was bound to do. There is no room for any imputation on the tenant's agent. He appears to me to have acted with the greatest propriety; and, therefore, the case of *Barclay* v. *Earle* does not apply; for there the whole of the defendant's proceeding was illegal, and a trick on the plaintiff. It has been admitted that the demandant was not aware of the statute; but when a party institutes proceedings by a writ of right, he should make every necessary enquiry as to the mode required for carrying them on with regularity, and according to prescribed forms, and more particularly so, as the Court is not in general inclined to favour a demandant in such an action.

Mr. Justice BURROUGH.—The clerk of the essoins would no doubt have informed the demandant's attorney that the tenant had entered a rule for him to adjourn the essoin according to the terms of the statute, if he had applied to him for that purpose; and he would also have told him that the adjournment by the demandant was irregular. The judgment of *non pros.* appears to have been properly

1827.

ROWLES Demandant; BOWLY, Tenant.

signed, and no trick can be imputed to the tenant or his agent in so doing.

Mr. Justice GASELEE.—It does not appear that the demandant's attorney has been deceived by any of the proceedings adopted by the agent for the tenant; and it is quite clear, that he made an improper adjournment of the essoin in the first instance. This rule, therefore, must be made—

Absolute.

Wednesday, Nov. 7th.

MEERT *v.* MOESSARD.

The defendant having, as administrator, received a sum of money, which, it was agreed by the parties entitled to it, was to be applied in discharge of the funeral expenses of the testator's widow, which had been paid by the plaintiff, promised so to apply it:—Held that the plaintiff was entitled to recover it, in an action for money had and received.

THIS was an action for money had and received, and brought to recover from the defendant the sum of 40*l.*, alleged by the plaintiff to have been received by the former for his use. The declaration contained the common money counts, and the defendant pleaded the general issue.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after the last Term, it appeared, that the plaintiff and defendant had married two sisters, the daughters of one *Peter Defreene*, who died at *Brussels*, in *May*, 1818, leaving an annuity of 100*l.* to his wife, during her life, which was secured by the sum of 2000*l.* Navy five *per cents.*, then standing in his name; and after the death of his wife, he directed, that the principal money should be equally divided amongst five children, the issue of the marriage, two of whom were the wives of the plaintiff and defendant. That the mother, Mrs. *Defreene*, also died at *Brussels*, in *May*, 1821, leaving her five children surviving; but *Peter Defreene*, the son, had previously administered to his father's property, jointly with the defendant's wife, and her husband. That, on the death of Mrs. *Defreene*, her son and the defendant, as

administrators, proceeded to sell out the 2000*l.* stock, for the purpose of dividing the same, which was accordingly done; and that 50*l.*, one half year's dividend, were due on the said principal sum of 2000*l.*, which formed the ground of the present action. That at the time of the death of Mrs. *Defreene*, the mother, at *Brussels*, the plaintiff and his wife being resident there, (the other four children being living in this country,) the plaintiff paid the funeral and other necessary expenses, amounting to 61*l.*, which the other children agreed to pay out of the half year's dividend, when received at the Bank of *England;* that when the stock was sold out, the 2000*l.* was equally divided between the children; but that 10*l.* only out of the 50*l.* was distributed, as the defendant proposed to keep the remaining 40*l.* for the purpose of paying the same to the plaintiff on account of the funeral expenses of Mrs. *Defreene*, at *Brussels*, and to which all the other branches of the family assented; but this the defendant afterwards refused to do, although nearly six years had elapsed from the time of her death, and although he had been frequently applied to, on behalf of the plaintiff, for that purpose; and in consequence the present action was commenced.

Peter Defreene, the brother of the defendant's wife, who had administered to the effects of his father, on being called as a witness, stated, that neither he nor his brother and sisters in this country, claimed any interest in the above sum of 40*l.* That when the principal and dividends were received at the Bank, by himself and the defendant, it was expressly agreed between them, that that sum should be paid to the plaintiff, on account of the expenses of the mother's funeral. That the plaintiff, in the first instance, stated the charges to have amounted to 61*l.*, to which the defendant objected, but said that he would keep the 40*l.* on his account until he saw that the charges were correct, when he would pay it over. This statement was corroborated by another witness, who accompanied

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the parties to the Bank. On which his Lordship told the Jury, that as the defendant, when he received the money, had promised to appropriate the sum of 40*l.* towards the funeral expenses paid by the plaintiff at *Brussels*, to which arrangement the other children had assented, the plaintiff was entitled to recover on the count for money had and received; and the Jury accordingly found a verdict for him, damages, 40*l.* Leave however was reserved to the defendant, to move to set it aside, in case the Court should be of opinion, that, under the above circumstances, the plaintiff was not entitled to recover.

Mr. Serjeant *Taddy*, on this day accordingly applied for a rule *nisi*, and submitted, that as there had been no communication between the plaintiff and defendant, as to the appropriation of the above sum of 40*l.*, (the former being abroad), and as the defendant's promise was merely conditional, viz. that he would pay it in case the plaintiff's account were correct, it was incumbent on him to shew that it was so, before he could be entitled to recover. Besides, there was no consideration moving as between the plaintiff and defendant, nor was there any promise, express or implied, to render the defendant liable for the funeral expenses of his wife's mother. He received, in his character of administrator, the principal stock and dividends, and was only entitled equally with the other children. In *Rann* v. *Hughes* (*a*), it was expressly determined, that an executor or administrator cannot be personally liable, unless a sufficient consideration be shewn; and although the defendant is not sued in his character of administrator, still he received the sum in question as such, and no promise can be implied, to render him liable to the plaintiff, for the expenses attending his mother's funeral.

(*a*) 7 Term Rep. 350, (n).

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Mr. Justice PARK.—I am of opinion, that there is no colour for the objection made to this verdict, which is not only against good faith and morals, but against every principle of law. The mother of the defendant's wife was buried abroad, at the expense of the plaintiff, who married one of her daughters, and when the monies in question were received by the defendant and *Peter Defreene*, the son, at the Bank, for the purpose of being divided amongst the five children, it was agreed by all parties, that the half yearly dividend then due should be applied to the expenses of the burial; and it being left in the hands of the defendant for that purpose, he now wishes to cheat the plaintiff, who is clearly entitled to it, as the defendant acknowledged, at the time he received it, that he held it to the plaintiff's use.

Mr. Justice BURROUGH.—This objection is against conscience; and I am of opinion, that the plaintiff, on proof of the above circumstances, was entitled to recover, even on the account stated.

Mr. Justice GASELEE, concurring—

Rule refused.

HUBBARD v. JACKSON.

Saturday, Nov. 10th.

THIS was an action of *assumpsit* on a bill of exchange, drawn by one *William Melville*, on the 25th *December*, 1820, upon, and accepted by the defendant, for 30*l.* at three months after date, payable to *Melville's* order, and indorsed by him to the plaintiff.

The drawer of a bill payable to his own order, indorsed it to *J. S.*, and, on its being dishonoured by the acceptor, the indorsee sued the drawer, who paid the amount of the bill and costs, and on the bill being delivered up to him, he afterwards indorsed it to the plaintiff:—Held, that the latter might recover as against the acceptor.

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At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after the last Term, it appeared that *Melville*, before the bill became due, indorsed, and paid it to a person of the name of *Wallace*, and, it being dishonoured by the defendant, *Wallace*, in 1821, sued *Melville*, as the drawer, who paid the amount of the bill, with costs; and that, about eighteen months afterwards, he indorsed it to the plaintiff, by whom the present action was commenced against the defendant as the acceptor. The Jury found a verdict for the plaintiff.

Mr. Serjeant *Storks*, now applied for a rule *nisi*, that this verdict might be set aside and a nonsuit entered, or a new trial granted; and submitted, that *Melville*, having once negotiated the bill, and paid the full amount after it became due and was dishonoured, could not afterwards reissue or negotiate it, so as to charge the defendant as the acceptor. In *Beck* v. *Robley* (*a*), it was decided, that a bill cannot be indorsed or negotiated, after it has been once paid, if such indorsement or negotiation would make any of the parties liable who would otherwise be discharged. That case however is distinguishable, as there the bill was drawn payable to the order of a third person, who indorsed it, and if, after it was taken up by the drawer, it had continued negotiable in his hands, that third person would have been liable. It must be admitted, however, that in *Callow* v. *Lawrence* (*b*), the Court of *King's Bench* held, that an indorsee who pays a bill may indorse or negotiate it, because his indorsement or negotiation will make no person liable but himself, and those parties whom he might sue.

Mr. Justice PARK.—In *Beck* v. *Robley*, it was insisted by the plaintiff's counsel, on moving for a new trial, that

(*a*) 1 Hen. Bl. 89, (n). (*b*) 3 Mau. & Selw. 95.

the drawer of a bill, which in course of circulation came back to his hands, might maintain an action as indorsee, and Mr. Justice *Ashhurst* said, that he remembered several instances of such actions.

Mr. Justice BURROUGH.—The plaintiff paid the bill, for the honour of the defendant, as acceptor, and no proof was adduced at the trial, to shew that there had been any alteration of circumstances as between them, to operate as a discharge of the latter.

Mr. Justice GASELEE.—The case of *Callow* v. *Lawrence* appears to me to be precisely in point, and the Court drew the distinction between a bill payable to the order of the drawer, and one payable to the order of a third person: there Lord *Ellenborough* said, "a bill of exchange is negotiable *ad infinitum*, until it has been paid by, or discharged on account of, the acceptor. If the drawer have paid the bill, it seems that he may sue the acceptor upon it; and if, instead of suing the acceptor, he put it into circulation upon his own indorsement only, it does not prejudice any of the other parties who have indorsed it, that the holder should be at liberty to sue the acceptor. The case would be different if the circulation of the bill would have the effect of prejudicing any of the indorsers."

Rule refused.

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Saturday, Nov. 10th.

In an action, against an underwriter, on a policy of assurance on freight, where the vessel, whilst taking in cargo at the *Cape of Good Hope*, for her voyage from thence to the port of *London*, was forced, through stress of weather, from her moorings, driven on shore, and sunk in the sand; and, her cargo being taken out, she was found to be so much damaged and shattered that it was deemed advisable to sell her; and she was accordingly sold by public auction as a mere wreck; but being subsequently repaired by the purchaser, she had made two or three voyages to this country:—Held, that an abandonment of the freight was unnecessary.

MOUNT *v.* HARRISON.

THIS was an action on a policy of assurance on the freight of a ship called the *Olive Branch*, valued at 1,000*l.*, at and from the *Cape of Good Hope* to *London*. At the trial before Mr. Justice *Park* at *Guildhall*, at the Adjourned Sittings after the last Term, it appeared, that the insurance was effected in 1822. That on the 19th *July* in that year, the vessel being moored in *Table Bay*, taking in cargo for *England*, experienced a heavy gale, parted from her cables, and, notwithstanding every exertion to save her, was driven on shore. That the cargo and stores were taken out, and that on the 22d she was sunk in the sand, which had drifted round her to the depth of eleven feet. That the master and crew, in the month of *August*, left her a mere wreck, and that, about three weeks or a month after she had lain in the sand, a merchant at the *Cape* purchased her at a public auction, together with several other vessels that had suffered from the same gale, and five or six months afterwards succeeded in getting her off the sand. That he afterwards caused her to be repaired, and that she had since made two or three voyages to this country, and was in the Docks at the time the present action was commenced. It appeared, however, that no notice of abandonment had been given to the underwriters, nor any communication made to them as to the nature of the loss at the time it happened; but the learned Judge was of opinion, that as the policy was on freight, such notice or communication was unnecessary: and he left it to the Jury to say, whether, under the circumstances, the master did every thing for the best, and for the interest of all concerned. They found in the affirmative, and accordingly gave a verdict for the plaintiff.

Mr. Serjeant *Taddy* now applied for a rule *nisi* that this verdict might be set aside, and a nonsuit entered, or

a new trial granted, on the ground, that, under the circumstances, an abandonment of the freight was necessary. It is a well known and established principle, that, an insurance being a mere contract of indemnity, the assured can recover no more than the amount of the loss actually sustained. It was the duty of the assured either to have transhipped the cargo, or given the underwriters the option of doing it, by an abandonment; and if the course pursued in the present instance be permitted, every policy on freight will become more than an indemnity; for the profits of the voyage may be recovered from the underwriter, without the expense of outfit, wear and tear, and wages; and here there has been no total loss, inasmuch as the ship ought not to have been sold. The only liability, on the underwriters, is for the proportion of general average attaching to the freight. Freight is the benefit to be derived from a contract for the carriage of goods; and the Ordinances of *Louis* 14th, as well as those of other foreign states, prohibit insurances on freight, as they hold out a temptation to the assured to commit acts of fraud, or to enter into wagering policies. In *Parmeter* v. *Todhunter* (*a*), it was decided, that there must be an abandonment of freight, where the goods specifically exist, although the ship be incapable of prosecuting her voyage. There the ship was captured, recaptured, and sold with her cargo; and in an action for a total loss on the policy on freight, Lord *Ellenborough* held, that there should have been an abandonment of the freight, because the goods might have been brought home in another ship, and so the freight might have been earned; here, too, that might have been done; and therefore the underwriters can only be called on to pay an average, and not a total, loss, as the cargo was taken out of the ship. Although in *Idle* v. The *Royal Exchange Assurance Company* (*b*), it was held, that an abandonment of the freight was

(*a*) 1 Camp. 541. (*b*) 3 B. Moore, 115; *S. C.* 8 Taunt. 755.

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unnecessary, yet it depended on the particular circumstances of the case, as the cargo could not be got out of the vessel. So, in the case of *Green* v. The *Royal Exchange Assurance* (*a*), no general rule was laid down, as it was decided on its particular facts; and the Court there said (*b*), "if the ship had brought home another cargo, and earned freight thereon, that would have been a salvage on the freight of her original cargo; for that, when the first cargo was once on board, the policy attached on the freight of that specific cargo; but if the captain, being driven back, and unable to proceed with the original cargo, was yet able to proceed with a less cargo or less freight, of this the underwriter ought to have the benefit." At all events, here the sale of the ship was unnecessary, as it did not appear to be a case of extreme necessity, as in *Idle* v. The *Royal Exchange*. Besides, the decision of the Court in that respect has been invalidated by the Court of *King's Bench*, who, on a writ of error, awarded a *venire de novo*, on the ground that the facts did not shew a sufficient necessity to justify the sale. In *Cambridge* v. *Anderton* (*c*), the ship was so much injured by the perils of the sea, as not to be repairable at all, or not repairable without an expense exceeding her value when repaired, so that a notice of abandonment was unnecessary. Here, however, the ship was in no immediate danger at the time she was driven on the sands; and she remained there a considerable time before she was sold; no attempt whatever being made to get her off within a reasonable period after the accident happened.

Mr. Justice PARK.—I am of opinion, that there is no ground whatever for a new trial. With respect to whether an abandonment of the freight were necessary or not, it is entirely a question of law; and I expressed my opinion at the

(*a*) 1 Marsh, 447; *S. C.* 6 Taunt. 68. (*b*) 6 Taunt. 72.
(*c*) 2 Barn. & Cress. 691.

trial in the terms laid down by Lord Chief Justice *Gibbs* in *Green* v. The *Royal Exchange Assurance;* and by Lord Chief Justice *Dallas*, in the subsequent case of *Idle* v. The *Royal Exchange, viz.*, that there is no necessity for an abandonment of freight, and that whether such an abandonment could be required or not, must depend upon the facts and circumstances of each particular case. It is impolitic to apply general principles to a question of this description; and I, therefore, see no reason to dissent from the opinion of the Court, so luminously given by Lord Chief Justice *Dallas* in *Idle* v. The *Royal Exchange*, with which I fully concurred. That case not only appears to me to have been rightly decided, but its authority has not been impugned by any subsequent determination; and it has now only been attempted to be met by the case of *Parmeter* v. *Todhunter*, which, although a decision at *Nisi Prius*, yet, resting as it does on the opinion expressed by Lord *Ellenborough*, must be considered as entitled to some weight. Lord Chief Justice *Gibbs*, on its being objected, in the case of *Green* v. The *Royal Exchange*, that there ought to have been an abandonment of the freight, on the authority of that case, observed (*a*), that he could not understand what there was to be abandoned; that when the freight of a ship was insured, as soon as the cargo was put on board, it became an insurance on that cargo. The strength of my brother *Taddy's* argument is founded on the principle, that, by the ordinances and usages of foreign countries, there can be no insurance on freight, as it opens a door to fraud, or wagering policies. But that is always subject to enquiry; and decisions of our Courts *in banc* are far stronger authorities than principles to be derived from ordinances of foreign states. I am, therefore, clearly of opinion, that, in this particular case, there was no necessity for an abandonment; and I so told the Jury at the trial. With respect to the second question, I left it to them to say, whether or

(*a*) 1 Marsh. 448.

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not, under the circumstances, the sale were made *bonâ fide*, as if the ship had been uninsured, and whether or not the master had acted for the benefit of all concerned. I thought it so clear a case, that I did not sum up so carefully and fully as I might have done; and, considering that there was a full special Jury, four of whom were underwriters, who hesitated a considerable time before they came to a conclusion, I think the verdict ought not to be disturbed.

Mr. Justice BURROUGH.—As to whether or not the sale were justified under the circumstances, was purely a question of fact for the Jury: and their verdict is conclusive. With respect to the necessity of an abandonment of the freight, the case of *Idle* v. The *Royal Exchange Assurance* is an express authority against it. When that case came before the Court, I felt the full force of the excellent argument of my brother *Lens*, *viz.*, that, in the case of freight, there was nothing to abandon. If, therefore, an abandonment were not necessary in this case, it could not be requisite to give any notice to the underwriters; and although my Lord Chief Justice *Dallas* expressed himself in cautious terms in *Idle* v. The *Royal Exchange*, yet my opinion then was, and now is, that, in a case of this description, abandonment of freight is unnecessary; and if it be meant to impugn the authority of that decision, the question may be raised by special verdict, or by a bill of exceptions, when it may be thought prudent so to do.

Mr. Justice GASELEE.—I am of the same opinion, on both points. There was, in fact, nothing to abandon. The accident happened near the *Cape*. The underwriters could have done nothing; and the goods were put on board other ships, before they could have received any notice of the nature of the loss, or the state in which the ship was left. With respect to the sale, it was most properly left to the consideration of the Jury; and it appears to me, that they have drawn a right conclusion.

Rule refused.

1827.

Monday, Nov. 12th.

WILLES and Another, Assignees of ELLIOTT the Younger, an Insolvent Debtor, *v.* ELLIOTT the Elder.

The ultimate assignees of an insolvent debtor take all the estate which before vested in the provisional assignee. Therefore, where an insolvent, after filing his petition, and after executing an assignment to the provisional assignee, but before the day of hearing, and before the assignment by the provisional, to the subsequently appointed, assignees, died: —Held, that his estate passed to the latter.

THIS was an action of trover, brought by the plaintiffs, as assignees of *Elliott* the younger, who had become insolvent. At the trial, before Lord Chief Justice *Best* at *Westminster*, at the Adjourned Sittings after the last Term, it appeared that *Elliott* the younger was committed to prison on the 31st *January* last, at the suit of the plaintiffs. That a petition for his discharge was presented to the Insolvent Debtor's Court on the 7th *February* following; and that he executed the usual assignment of his estate and effects to the provisional assignee, on the same day; that he died on the 26th *March*, previously to his petition being heard, or to his passing any examination; and that the subsequent assignment was not made to the plaintiffs, by the provisional assignee, until the 3d *April* following.—For the defendant, it was insisted, that the plaintiffs were not entitled to sue, as the insolvent died before the assignment of his estate and effects to them.—The Lord Chief Justice, however, thought there was no ground for the objection; and the Jury found a verdict for the plaintiffs, the damages to be referred to an arbitrator; but leave was given the defendant to move that a nonsuit might be entered, in case the Court should be of opinion that the plaintiffs had no title, as assignees of the insolvent, to enable them to maintain this action.

Mr. Serjeant *Taddy*, on a former day in this Term, accordingly obtained a rule *nisi*; and, admitting that the opinion of his Lordship seemed to be against him at the trial, he insisted, that the objection must prevail, as, by the statute 7 *Geo.* 4, c. 57, s. 11 (*a*), it is provided, that in case

(*a*) By which it is enacted, "that the prisoner shall, at the time of subscribing his petition, duly execute a conveyance and assign-

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the petition of a prisoner shall be dismissed by the Insolvent Court, the conveyance and assignment to the provisional assignee shall, after such dismission, be void. And here, although the petition was not in fact dismissed, as the insolvent died before its merits were gone into, and before he could derive any benefit from it; yet the plaintiffs, as assignees, could only be entitled to his estate by his being *discharged under the act;* and his death *before adjudication* would operate, at all events, as a revocation of his petition, as well as of the assignment made, conditionally, to the provisional assignee.

ment to the provisional assignee of the Court, in such form as is to the act annexed, of all the estate, right, title, interest, and trust of such prisoner, both within this realm and abroad, except the wearing apparel, bedding, and other such necessaries of such person, and his or her family, and the working tools and implements of such prisoner, not exceeding, in the whole, the value of *twenty* pounds, and of all future estate, right, title, interest, and trust of such prisoner, in or to any real and personal estate and effects, within this realm or abroad, which such prisoner may purchase, or which may revert, descend, be devised or bequeathed, or come, to him or her, before he or she shall become entitled to his or her final discharge in pursuance of the act, according to the adjudication made in that behalf, (or in case such prisoner shall obtain his or her discharge from custody, without any adjudication being made in the matter of his or her petition, then, before such prisoner shall be at large and out of custody,) and of all debts due or growing due to such prisoner, or to be due to him or her before such discharge as aforesaid; which conveyance and assignment, so executed as aforesaid, in form aforesaid, shall vest all the real and personal estate and effects of such prisoner, and all such future real and personal estate and effects as aforesaid, of every nature and kind whatsoever, and all such debts as aforesaid, in the said provisional assignee; and the same shall be made subject to a proviso, that in case the petition of any such prisoner shall be dismissed by the said Court, such conveyance and assignment shall, from and after such dismission, be null and void, to all intents and purposes; and the said Court is hereby empowered to dismiss any such petition, in the matter whereof a final adjudication shall not have been made in pursuance of this act, at any time when it shall seem fit to the said Court to dismiss the same."

The Court were then strongly inclined to think that there was no ground for the objection; as, if the insolvent had been alive, he could not have been a party to the assignment to the plaintiffs, who, as assignees, took all the estate of the insolvent, which had originally vested in the provisional assignee.

Mr. Justice PARK now said, that he had mentioned the case to the Lord Chief Justice, who entertained no doubt whatever on the point; and that the Court perfectly concurred with him, on the ground, that an insolvent debtor is no party to the subsequent assignment; and that the ultimate assignees take all the estate and effects of the debtor, which were before vested in the provisional assignee.

Rule refused (*a*).

(*a*) The *eleventh* section of the statute 7 *Geo.* 4, c. 57, directs, that "the assignment to the provisional assignee shall be made subject to a proviso, that in case *the petition of the prisoner shall be dismissed by the Court, such assignment shall, from and after such dismission, be null and void to all intents and purposes;*" and the *nineteenth* section enacts, "that by the conveyance or assignment by the provisional assignee to the assignees subsequently appointed, the estate of the prisoner shall be, to all intents and purposes, *as effectually and legally vested, by relation, in such subsequently appointed assignees, as if the conveyance and assignment had been made by such prisoner to them;*" clearly not intending that the new assignees should take more than the provisional assignee took, or could assign. It may, therefore, admit of question, whether the death of the prisoner did not operate as a *dismission of his petition*, inasmuch as it could not be heard, and thereby render the assignment to the provisional assignee, and consequently that to the after-appointed assignees, void.

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Tuesday, Nov. 13th.

An affidavit of debt, sworn before a commissioner in the country, without stating him to be a commissioner, in the Jurat, is insufficient, although intitled in this Court; and the Court will not allow a supplemental affidavit to aid the defence, to be filed.

HOWARD *v.* BROWN.

A RULE was obtained by Mr. Serjeant *Russell*, on the first day of this Term, calling on the plaintiff to shew cause why the bail-bond, which had been given by the defendant in this cause, should not be delivered up to be cancelled, on his entering a common appearance, on the ground of an irregularity in the affidavit to hold to bail, the person in the country before whom it was sworn, not being, in the jurat, styled a commissioner.

Mr. Serjeant *Wilde*, now shewed cause, and submitted, that, as the affidavit was intitled in this Court, and the party before whom it was sworn had signed it with his christian and surname, it was unnecessary to state that he was a commissioner, as no one out of *London* could be authorized to take affidavits, unless duly appointed a commissioner.

But the Court referred to the case of The *King* v. *Hare* (*a*), where the Court of *King's Bench* took a distinction between affidavits sworn before a commissioner, and those sworn in Court, or before a Judge, and held, that an affidavit sworn before *A. B.* a commissioner, without stating him to be a commissioner of that Court, could not be read.

Mr. Serjeant *Wilde*, attempted to distinguish that case from the present, as there the affidavit was not intitled in any Court, and the application was in a criminal proceeding, *viz.* for a writ of *mandamus*, and he prayed leave to file a supplemental affidavit.

But the Court thought that the affidavit, as sworn, was informal, and said that they could not permit the defect to be aided by a supplemental affidavit.

Rule absolute (*b*).

(*a*) 13 East, 189.

(*b*) See the *Kennet and Avon Canal Company* v. *Jones*, 7 Term Rep. 451.

1827.

The LIMERICK and WATERFORD Railway Company *v.* FRAZER.

Tuesday, Nov. 13th.

An Irish joint-stock company, incorporated by act of Parliament, having sued a defendant in this Court, the proceedings were ordered to be stayed, until the Company gave security for costs; it appearing that they had no available property in *England*.

MR. Serjeant *Wilde*, having, on a former day in this Term, obtained a rule calling on the plaintiffs in this suit to shew cause why they should not give security for costs, and why the proceedings should not in the mean time be stayed, on affidavits, which stated,—that the action was brought by the plaintiffs, against the defendant, for the recovery of the sum of 200*l.* alleged to be due to the plaintiffs, for calls on certain shares, alleged to be held by the defendant, in a certain undertaking or company, called "The *Limerick* and *Waterford* Railway Company;"—that the company was a company incorporated by act of Parliament, for the purpose of making and maintaining a railway or tram-road, from the city of *Limerick* to the town of *Carrick*, in the county of *Tipperary*, with several branches therefrom, in the county of *Tipperary* aforesaid, and in the county of the city of *Cork*;—that the operations and works of the said plaintiffs, as such company, were wholly confined to the kingdom of *Ireland*, and that the said plaintiffs were not, as such company, possessed of any property in this country, to answer the payment of costs, in case the defendant should succeed in the action;—that application for security for costs had been made to the attorney for the plaintiffs, who had refused to give it:—and that the defendant had a good defence to the action, on the merits.

Mr. Serjeant *Merewether*, now shewed cause, on an affidavit, stating that the company had property in this country, amenable to the costs in the cause, in case they failed in obtaining a verdict, *viz.* a sum of 3000*l.* in the hands of Messrs. *Hammersley*, their bankers.

Mr. Serjeant *Wilde*, in support of his rule, contended

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that, although the company might now have a tangible balance at their bankers, it was highly improbable, from the nature of the concern, that that balance would remain there long, as it must necessarily be sent to *Ireland*, in order to the carrying on of the company's works there; and that, therefore, the defendant, in case of a nonsuit, or verdict being given for him, on the trial, would be entirely without remedy, none of the individuals who composed the company being within the reach of the law, so as to have process served upon them for the costs.

The Court held, that, the company having, or being likely to have, all the property they might ever be possessed of, out of the reach of the process of the Court, and the defendant being thereby likely to lose the benefit of that process, in respect of costs, in case the plaintiffs should fail in the action, he was entitled to have his rule made——

Absolute.

Wednesday, Nov. 14*th.*

GRINDALL *v.* SMITH.

The plaintiff described himself as *Charles Edmund* in the affidavit to hold to bail, and was named *Charles* only in the writ and declaration: —Held, that the defendant should have applied to set aside the writ, in the first instance, there being no affidavit of debt to warrant its being sued out; but, as the defendant had given bail, the Court ordered an *exoneretur* to be entered on the bail-piece.

A RULE was obtained on a former day in this Term, by Mr. Serjeant *E. Lawes*, calling on the plaintiff to shew cause why the declaration, and subsequent proceedings in this cause, should not be set aside for irregularity, and an *exoneretur* entered on the bail-piece, on a common appearance being entered for the defendant, on the ground of a variance between the affidavit to hold to bail, and the writ and declaration. He founded his motion on an affidavit, which stated, that, in the affidavit of debt, the plaintiff was described as *Charles Edmund*

Grindall, and that in the writ and declaration he was named *Charles* only.

Mr. Serjeant *Wilde*, now shewed cause, and insisted that the defendant should have applied, in an earlier stage of the cause, to set aside the writ; but that, as he had appeared and perfected bail, he had thereby cured any irregularity or inconsistency between the affidavit to hold to bail, and the writ, the only effect of which is to bring the party into Court; and that the defendant, having only applied to set aside the declaration, which was regular, and founded on the writ, to which alone the objection should have been taken, could not now be heard.

Mr. Serjeant *E. Lawes*, in support of the rule, said, that he did not seek to impeach the writ on motion, as the defendant might have pleaded the *misnomer* of the plaintiff in abatement; but that his objection was to the declaration, which was at variance with the affidavit to hold to bail. He submitted, that in *King, qui tam*, v. *Horne* (*a*), it was held, that a plaintiff, who sues for penalties under the lottery act, *27 Geo. 3*, c. 1, s. *2*, must, previously to the suing out of the writ, make affidavit, specifying the amount of the penalties sued for, and the amount must be inserted in the first process; and as the plaintiff described himself as *Charles Edmund*, in the affidavit, the declaration ought to have corresponded with it. That he had misdescribed himself, either in the affidavit of debt or in the declaration; and that, although he might not have been guilty of fraud, still it would tend to the greatest inconvenience if inaccuracies of this description were allowed.

Mr. Justice PARK.—The plaintiff has described himself in the affidavit, by virtue of which the writ, under which the defendant was arrested, was issued, as *Charles Edmund*

(*a*) 4 Term Rep. 349.

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Grindall, and has declared in the name of *Charles* only. This is clearly irregular. The defendant should, however, have applied, in the first instance, to set aside the writ, as there was no affidavit of debt to warrant its being sued out. But the bail are clearly entitled to be relieved, the plaintiff being described as *Charles* in the writ, and there being no affidavit of debt corresponding with it.

Mr. Justice BURROUGH, and Mr. Justice GASELEE, concurring:—that part of the rule which related to entering an *exoneretur* on the bail-piece, was made—

Absolute.

Friday, Nov. 16th.

WADE *v.* WILLIAM STIFF, HENRY COX, WILLIAM NEWMAN, and SAMUEL WILLIAM REEVES.

[E. T. 8 G. 4. Roll 744 (a)].

To a joint action of trespass against four defendants, one of them pleaded a *misnomer* in abatement, and concluded by praying judgment "*of the writ, and that the same may be quashed, &c.*" —Held bad on general demurrer, as the *misnomer* only operated to abate the writ *as to the party misnamed.*

THIS was an action brought by the plaintiff, against the above-named four defendants, for an assault and false imprisonment. The three first suffered judgment by default, and the defendant *Reeves* pleaded a *misnomer* in abatement, as follows:—

"And *Samuel Reeves*, against whom, by the name of *Samuel William Reeves*, the plaintiff has issued his original writ in this behalf, in his proper person comes and says, that he was baptized by the name of *Samuel*, to wit, at, &c., and from his baptism hitherto hath been, and now is, known by the christian name of *Samuel*; without this, that he now is, or at the time of the suing forth of the original writ of the plaintiff in this behalf, or at any other

(a) Great inconvenience having, in many instances, been found to arise from the want of reference, in all the modern reports, to the number of the *Roll*, it has been deemed advisable, in beginning a new series of these Reports, to make such reference, in all cases where it may become necessary to examine the record.

time was, known or called by the christian name of *Samuel William*, as by the said writ is above supposed. And this he the said *Samuel* is ready to verify; wherefore he prays judgment *of the said writ, and that the same may be quashed*, &c."

To this plea the plaintiff demurred generally, and the defendant *Reeves* joined in demurrer.

Mr. Serjeant *Spankie*, in support of the plea, submitted, that, although it concluded by praying that the *whole* of the writ might be quashed, thereby including all the defendants, yet that, the action being in its nature several, the plaintiff need not have joined them all in one suit. He contended that, although the names of four were inserted in the body of the writ, yet the plea of *misnomer* by one might apply to him in severalty. In *Comyns's Digest* (*a*), it is laid down, that "when by a plea in abatement, the whole action is defeated, the whole writ shall abate; as, if the writ be abated for default of form of the register, or the plaintiff or defendant die, or *be misnamed*:" and here, as the writ was in its nature several, the prayer, at the conclusion of the plea, to quash it, must be taken to apply only to the defendant who had been misnamed.

Mr. Serjeant *Stephen, contra*, was stopped by the Court.

Mr. Justice PARK.—The authority referred to in *Comyns's Digest*, applies to cases of contract; and in *Rawlinson* v. *Oriet* (*b*), where an action of trespass was brought against two defendants, and they pleaded, in abatement, that the plaintiff had sued out a bill against one of them for the same trespass, which was yet depending, Lord Chief Justice *Holt* said, "if you plead a *misnomer*, it shall

(*a*) "Abatement," M. tit. (*b*) Rep. temp. Holt, 1. "When the whole writ abates."

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abate only as to the party pleaded, unless where the death of one shall abate the writ, as upon a joint contract, &c. But it is otherwise in trespass." So here, the four defendants were sued as joint trespassers, and the *misnomer* of *one* can be no ground to abate the writ *as against the others*. There is a wide distinction between a plea in abatement and a plea in bar, as was laid down, in The *King* v. *Shakespeare* (*a*), by Lord *Ellenborough*, who there said, "in the case of a plea in bar, the Court will give that judgment, which, upon the whole of the record, appears to be the proper judgment, although not regularly prayed for by the party; but, in abatement, the Court will give no other than the proper judgment prayed for by the party." On these grounds, I am clearly of opinion, that the prayer in this plea cannot be supported, as it seeks to quash the *whole* of the writ.

Mr. Justice BURROUGH concurred.

Mr. Justice GASELEE.—In cases where there are conflicting authorities, common sense must prevail. The original writ was sued out against four defendants, charging them with a joint trespass; and a misnomer of *one* can be no ground to abate the writ as against *all*. There must therefore be—

Judgment of *respondeat ouster*.

(*a*) 10 East, 87.

Friday, Nov. 16th.

JOHNSON *v.* DOBELL.

The defendant having been arrested on a *capias*, returnable on a day certain, instead of on a general return day, and given a bail-bond to the sheriff:—The Court refused to allow the writ to be amended, unless the plaintiff would consent to discharge the bail on the defendant's entering a common appearance.

A RULE having been obtained by Mr. Serjeant *Wilde*, on a former day in this Term, that the writ of *capias ad*

respondendum, which had been sued out against the defendant in this cause, and under which he had been arrested, and had given a bail-bond to the sheriff, and all the subsequent proceedings thereon, might be set aside for irregularity, on the ground that the writ was made returnable on a day certain, instead of on a general return day; *viz.* " on *Tuesday* next after the morrow of *All Souls*," instead of " on the morrow of *All Souls*."

Mr. Serjeant *Taddy* now shewed cause, on an affidavit, which stated that the *præcipe* to the filacer was regular, and that the particular day had been inserted by mistake; and he applied to amend, on the authority of *Walker* v. *Hawkey* (*a*), where the Court allowed an amendment to be made, in this respect, on shewing cause against a rule obtained to quash the writ for irregularity, without a cross motion. He submitted that, although it might be said that that was a case of serviceable process, the same rule must apply to bailable; for, in *Reubel* v. *Preston* (*b*), where the defendant was *arrested* on a bill of *Middlesex*, returnable " on *Monday* next after the morrow of the *Holy Trinity*," instead of on the usual return, "on *Monday* next after eight days of the *Holy Trinity*," the Court allowed the writ to be amended. So, in *Davis* v. *Owen* (*c*), though there were not fifteen days between the teste and return of a *capias*, it was held that it might be amended; and here it is sworn that the mistake was made in filling up the writ, the *præcipe* to the filacer being regular in the first instance.

Mr. Serjeant *Wilde*, in support of his rule, submitted, that there was a wide distinction to be drawn between cases where the original parties to the suit were concerned, and those where a bail-bond has been given, when there are other interests that may be affected, as in *Inman* v. *Huish* (*d*),

(*a*) 1 Marsh. 399; *S. C.* 5 Taunt. 853.
(*b*) 5 East, 291.
(*c*) 1 Bos. & Pul. 342.
(*d*) 2 New Rep. 133.

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where a *testatum capias* having been made returnable on a day certain, as here, the Court refused to amend it, on the ground that the bail would be affected by it. In *Reubel* v *Preston*, it does not appear that any bail-bond was executed; and in *Walker* v. *Hawkey*, it was admitted in argument that the process was serviceable only. The condition of the bail-bond is for the appearance of the principal on a particular or given return day; and, in an action on the bond, the bail would be estopped from shewing that the writ was made returnable on an improper day, as it would only be necessary to produce the bond in evidence, in order to render them liable according to the terms of the condition.

The Court, under the circumstances, refused to allow the writ to be amended, unless the plaintiff would undertake to discharge the bail, on the defendant's entering a common appearance: and on these terms the rule was made.—

Absolute.

Monday, Nov. 19th.

A motion requiring a plaintiff to give security for costs, on the ground of his being resident abroad, must be made before plea pleaded; and it seems that such security cannot be required from a foreigner, a master of a vessel trading to this country, but having no fixed residence here.

KASTEN *v.* PLAW and Another.

A RULE having, on a former day in this Term, been obtained by Mr. Serjeant *Jones*, calling on the plaintiff, or his attorney or agent, to shew cause why the proceedings in this cause should not be stayed until security for costs was given, on an affidavit which stated that the plaintiff was a foreigner, and the master of a vessel, and that he was in the habit of trading backwards and forwards from the northern ports of *Germany* to *London*, and that he had no fixed place of residence in this country,—

Mr. Serjeant *Wilde*, now shewed cause, on an affidavit of the plaintiff's broker, who stated, that he believed that

the plaintiff would return shortly to this kingdom: and it was also sworn that the notice of the rule calling on the plaintiff to give the security required, was not served on his attorney till after plea pleaded, the declaration having been delivered on the 1st *November* instant, and the plea delivered on the 7th; and that the clerk to the defendant's agent applied to the agent for the plaintiff to have it returned to him on the morning of the 10th, before the rule was served. Under these circumstances, the learned Serjeant contended, on the authority of *Nelson* v. *Ogle* (*a*), that the plaintiff could not be called on to give security for costs; as in that case the Court did not require such security from a foreigner, a captain of a ship, who was in the habit of sailing to and from the ports of this country, on the ground that his case was not distinguishable from that of an *English* sailor. And he submitted, that it was the established practice of this Court, that where a plaintiff, being abroad, is called on to give security for costs, the application must be made, and notice of rule served, before plea pleaded.

Mr. Serjeant *Jones*, in support of his rule, referred to *Tidd's Practice* (*b*), where it is said that the rule requiring security for costs has been relaxed, by this Court, in favour of foreign seamen serving on board *English* ships, or being in the habit of navigating them to and from the ports of this country; and that accordingly, in *Durell* v. *Mattheson* (*c*), a foreigner was not required to give security during his absence from this country, on board his own ship, it being sworn that he occasionally resided here. He submitted, that with respect to the second objection, the application might be made at any time before issue joined.

(*a*) 2 Taunt. 253. (*b*) 7th Edit. Vol. 1, 552.
(*c*) 3 B. Moore, 38.

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Mr. Justice PARK.—The Secondary has stated that a motion requiring security for costs, must be made before plea pleaded. There is, consequently, no ground for the present application. It appears to me, however, that it cannot be supported on the first objection, as the case of *Nelson* v. *Ogle* is expressly in point. That of *Durell* v. *Mattheson* is altogether distinguishable, as there it was sworn that the plaintiff resided in this country during four months in the year.

Mr. Justice BURROUGH, concurred.

Mr. Justice GASELEE.—The defendant cannot require a plaintiff, who is out of this country, to give security for costs after an order for time to plead has been obtained; and here it has been sworn that the notice of the rule was not served until after plea pleaded. This rule, therefore, must be—

Discharged (*a*).

(*a*) See *Michel* v. *Pareski*, 2 H. Bl. 593; and *Muller* v. *Gernon*, 3 Taunt. 272, where the Court decided, that after a defendant had undertaken to accept short notice of trial, he could not compel a plaintiff, resident abroad, to give security for costs; and in the latter case it appeared, that the motion was made before plea pleaded. In *Du Belloix* v. Lord *Waterpark*, 1 Dow. & Ryl. 348, n., where the plaintiff resided abroad with the knowledge of the defendant, at the time of action brought, the Court refused to require him to give security for costs, after issue joined, unless some special reason were assigned, to induce them to impose such terms on the plaintiff; and in the subsequent case of *Duncan* v. *Stint*, 5 Barn. & Ald. 702; *S. C.* 1 Dow. & Ryl. 348, it was held, that a motion for security for costs, on the ground of the plaintiff's residence abroad, cannot be made, if the defendant have taken any step in the cause, subsequently to his becoming acquainted with the fact of the plaintiff's being resident abroad, and, therefore, that the affidavit in support of the motion, if made *after plea*, must expressly state that the defendant was not acquainted with the plaintiff's absence from this country at the time he pleaded.

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SAMUEL BLACKBURN *v.* JOHN BLACKBURN.

Monday, Nov. 19th.

THIS was an action for a libel. The *first* count of the declaration was as follows:—

"That, whereas, the plaintiff now is a good, true, honest, just, and faithful, subject of this realm, and as such hath always behaved and conducted himself, and, until the time of committing the several grievances, by the defendant, as hereinafter mentioned, was always reputed, esteemed, and accepted, by and amongst all his neighbours, and other good and worthy subjects of this realm, to whom he was in any wise known, to be a person of good name, fame, and credit, to wit, at &c. And whereas the plaintiff, before and at the time of committing the said several grievances, by the defendant, as hereinafter mentioned, was, and from thence hitherto hath been, and still is, a *minister* of a certain congregation of Protestant dissenters, assembling for divine worship at a meeting-house in *Bethnal-Green*, in the county of *Middlesex*, commonly called the Rev. *John Kello's* meeting-house; and, as such minister, he, the plaintiff, hath always behaved and conducted himself with uprightness, and integrity of conduct; and hath not ever been guilty, or, until the time of committing the said several grievances by the defendant, as hereinafter mentioned, been suspected to have been guilty,

The plaintiff being about to be elected preacher to a congregation of dissenters, one of its members called on the defendant to make enquiries as to his character;—the defendant mentioned some circumstances, in a manner reflecting very grossly on the plaintiff, and imputing to him forgery: which, turning out to be unfounded, the deacons of the congregation sent a circular to each of its members, with a view to remove the effect of those aspersions; and the defendant, in answer, wrote a letter to them, in which, after repeating what he had before said, he inserted what he alleged to be the opinion of

counsel, but which was, in fact, only part of such opinion, he having purposely withheld part of it, which was a qualification of that set out. The Jury, having found that the libel imputed forgery to the plaintiff, but that the defendant was not actuated by *express* malice, gave a verdict for the plaintiff, with 50*l.* damages. On motion for the defendant to have it entered for him on the general issue, and for the plaintiff on the special plea, on the grounds that the Jury having negatived express malice, the action could not be maintained; and that the letter containing the libel was a privileged communication: and on motion by the plaintiff for a new trial, on the ground that from the lapse of time since the bill was given, and the defendant's withholding that part of the opinion which was favourable to the plaintiff's case, there was sufficient proof of *express* malice, and that the Jury ought to have found it.—The Court refused to disturb the verdict.

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of forgery, or of the offences and misconduct hereinafter mentioned to have been charged upon, and imputed to, the plaintiff, or of any other such hurtful crime, offence, or misconduct. By means of which several premises, he, the plaintiff, before the committing of the said several grievances by the defendant, as hereinafter mentioned, had not only deservedly gained the good opinion and credit of all his neighbours, and other good and worthy subjects of this realm, to whom he was in any wise known; but had also thereby acquired, and was then daily and honestly acquiring, sundry great gains, emoluments, and advantages, to the comfortable support of himself and his family, to wit, at &c., aforesaid. And whereas also, before the time of committing the said several grievances, by the defendant, as hereinafter mentioned, to wit, on &c., at &c. aforesaid, certain rumours and reports having been circulated, injurious to the character of the plaintiff, a certain letter and statement had been and were published, and circulated, by the Rev. *John Kello*, minister, and *Robert Garrett* and *John King*, deacons, of the said congregation; in which said statement, there was and is contained (amongst other things) the words and matter following, of and concerning the plaintiff, and of and concerning a certain bill of exchange, before then drawn and accepted by the plaintiff, payable to himself, the plaintiff, or his order, and by him, the plaintiff, indorsed, and delivered to one *James Blackley*, (that is to say)—'It was now that unpleasant rumours, which were traced to Mr. *R. L. Sturtevant* (meaning one *Richard Lawrence Sturtevant)*, began to create uneasiness, and Mr. *Garrett* (meaning the said *Robert Garrett)*, the senior deacon, waited on him (meaning the said *Richard Lawrence Sturtevant)*, and enquired what grounds, he (meaning the said *Richard Lawrence Sturtevant)* had for the reports he had circulated respecting Mr. *Blackburn* (meaning the

plaintiff); the reply of Mr. *Sturtevant* (meaning the said *Richard Lawrence Sturtevant)* was, — Mr. *Blackburn* (meaning the plaintiff) has put his uncle's name (meaning the name of the defendant, the uncle of the plaintiff) to a bill of exchange (meaning the said bill of exchange, hereinbefore mentioned), which he (meaning the defendant) was obliged to pay, to prevent him (meaning the plaintiff) from being prosecuted:—and stated some other circumstances which, if true, involved the moral consistency of Mr. *Blackburn* (meaning the plaintiff). The result of this conference was communicated to the Rev. *J. Kello* (meaning the said *John Kello)*, who informed Mr. *Blackburn* (meaning the plaintiff) of the serious imputations cast upon him (meaning the plaintiff). No sooner was the communication made to Mr. *B.* (meaning the plaintiff), than he (meaning the plaintiff) sought an interview with Mr. *R. L. Sturtevant* (meaning the said *Richard Lawrence Sturtevant)*, and entreated him (meaning the said *Richard Lawrence Sturtevant)* to accompany him (meaning the plaintiff) instantly to his uncle, Mr. *John Blackburn* (meaning the defendant), No. 126, *Minories;* with whom he (meaning the plaintiff) had held no sort of intercourse for the last twelve years. They (meaning the plaintiff and the said *Richard Lawrence Sturtevant)* went accordingly, and the said Rev. *S. Blackburn* (meaning the plaintiff) having ascertained that Mr. *Sturtevant* (meaning the said *Richard Lawrence Sturtevant)* had really received from Mr. *John Blackburn* (meaning the defendant) some communications calculated to induce him (meaning the said *Richard Lawrence Sturtevant)* to suppose that the imputation was well founded, a meeting was arranged for the following *Thursday*, at which were present, Mr. *Sturtevant*, Senr. (meaning one *Saunderson Turner Sturtevant)*, Mr. *R. L. Sturtevant*, Junr. (meaning the said *Richard Lawrence Sturtevant)*, Messrs. *Garrett* and *King* (meaning the said *Robert Garrett* and *John King)*, the deacons

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of the church, and Mr. *John Blackburn* (meaning the defendant), from whom the injurious report had originated, and who was now requested to produce the bill (meaning the aforesaid bill of exchange), on which he (meaning the defendant) had rested his insinuations of fraud, or forgery, or both. It is not for man to judge the motives of his fellow men, they can only be known to God. The following, however, are the facts, as clearly developed at this meeting. When Mr. *John Blackburn* (meaning the defendant) was requested to produce the bill (meaning the aforesaid bill of exchange), he (meaning the defendant) affected great reluctance, cautioned his nephew, the Rev. *S. Blackburn* (meaning the plaintiff), who appeared impatient for its production, that he (meaning the defendant) would not be answerable for the consequences, if it (meaning the said bill of exchange) were produced; and, in fact, led every person present to the painful conclusion, that the document (meaning the said bill of exchange) would confirm the charge, and justify those who had brought it forward. At length the bill (meaning the aforesaid bill of exchange) was exhibited, and was found to be a simple bill of exchange, drawn thirteen years ago, accepted by Mr. *Samuel Blackburn* (meaning the plaintiff), and made payable at No. 126, *Minories*, his (meaning the plaintiff's) uncle's residence (meaning the residence of the defendant), where he (meaning the plaintiff) occasionally resided when in Town; the necessary funds to meet the payment of the bill (meaning the aforesaid bill of exchange), except nine shillings, being also sent by him (meaning the plaintiff) to his uncle (meaning the defendant), before the bill (meaning the said bill of exchange) became due, in a letter, which was also produced, stating that such bill would be presented, and requested that it might be taken care of, till he (meaning the plaintiff) came to Town. In fact, the whole transaction was honourable, and regular, and proved nothing but the evil disposition of the individual who could

attempt to extract from it any other meaning.'—Yet the defendant, well knowing all and singular the premises aforesaid, but greatly envying the happy state and condition of the plaintiff, and contriving, and wickedly and maliciously intending, to injure the plaintiff in his aforesaid good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, with and amongst all his neighbours, and other good and worthy subjects of this realm to whom he was in any wise known; and to cause it to be suspected, and believed, by those neighbours and subjects, that he, the plaintiff, had been, and was, a person of bad and immoral character and conduct, and that he had been, and was, guilty of forgery, and of the offences and misconduct hereinafter mentioned to have been charged upon, and imputed to, the plaintiff; and to subject him to the pains and penalties, by the laws of this kingdom, made and provided against, and inflicted on, persons guilty thereof, heretofore, to wit, on &c., at &c. aforesaid, falsely, wickedly, and maliciously, did compose and write, and cause and procure to be composed and written, a certain false, scandalous, malicious, and defamatory, libel, in the form of a letter, addressed to the Rev. *John Kello*, *Robert Garrett*, and *John King* (by the name and description of the Rev. *John Kello*, and Messrs. *Garrett* and *King*, the pastor, and deacons, of the independent church at *Bethnal-Green)*, bearing date the day and year last aforesaid, and signed by, and in the name of, the defendant; in one part of which said libel, there was, and is, contained the false, scandalous, malicious, defamatory, and libellous, words and matter following, of and concerning the said bill of exchange, and also of and concerning the said letter and statement, which had been so printed, published, and circulated, as aforesaid, (that is to say)—'Let me (meaning the defendant) then, in the first place, remind you (meaning the said *John Kello*, *Robert Garrett*, and *John King)*, that I (meaning the de-

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fendant) did not seek for an opportunity to expose the conduct of the Rev. *S. Blackburn* (meaning the plaintiff), but that Mr. *R. Sturtevant* (meaning the said *Richard Lawrence Sturtevant)*, as a member of the church about to chuse that reverend person (meaning the plaintiff) as their co-pastor, applied to me (meaning the defendant), in all the confidence of old acquaintance, to inform him (meaning the said *Richard Lawrence Sturtevant)* what were my (meaning the defendant's) views of that individual's (meaning the plaintiff's) character. Now, as I (meaning the defendant) considered it as one of the most fearful calamities that can befal a church, to receive, as its pastor, a man of questionable character, I (meaning the defendant) did, in the confiding frankness of christian intercourse, and upon his (meaning the said *Richard Lawrence Sturtevant's)* promise to keep the matter secret, inform him (meaning the said *Richard Lawrence Sturtevant)* of that transaction to which your letter (meaning the said letter of the said *John Kello*, *Robert Garrett*, and *John King)* alludes, and which, associated in my (meaning the defendant's) mind with other facts, had produced impressions concerning the moral habits of the party concerned (meaning the plaintiff), which I (meaning the defendant) will not now describe. I (meaning the defendant) had, indeed, received statements from *Tunbridge Wells*, *Canterbury*, and *Luton*, respecting the character of the Rev. gentleman (meaning the plaintiff), whilst travelling in the *Westleyan* methodist connection, no way to his (meaning the plaintiff's) honour; but I (meaning the defendant) could not prove them; also statements from the counties of *Nottingham*, and *Derby*, unsought for by me (meaning the defendant), upon the authority of some of the most respectable ministers in those districts, that the conduct of the individual in question (meaning the plaintiff), when an independent minister in their neighbourhood, was not irreproachable; but then I (meaning the defendant) could not

substantiate them. Yet these statements, supported by creditable testimony, together with the facts in my (meaning the defendant's) own possession, produced an amount of moral evidence, the force of which I (meaning the defendant) shall feel as long as I (meaning the defendant) live: And, therefore, I (meaning the defendant) did think it a duty to my friend *Sturtevant* (meaning the said *Richard Lawrence Sturtevant)*, and to the church at *Bethnal-Green*, to put him (meaning the said *Richard Lawrence Sturtevant)* in possession of the facts of that bill transaction (meaning the transaction relative to the said bill of exchange), which, in my (meaning the defendant's) own judgment, includes both falsehood and fraud.' And in another part of which said libel there was, and is, contained, the false, scandalous, malicious, defamatory, and libellous, words and matter following, of and concerning the plaintiff, and of and concerning the said bill of exchange, and of and concerning the said letter and statement which had been so printed, published, and circulated, as aforesaid, (that is to say)—' If you (meaning the said *John Kello*, *Robert Garrett*, and *John King*) recollect, I (meaning the defendant) cautioned your reverend friend (meaning the plaintiff) respecting the consequences, because I (meaning the defendant) believed it was fraudulent in its character, and might involve penal results of no desirable kind. How far my (meaning the defendant's) impressions were correct, you (meaning the said *John Kello*, *Robert Garrett*, and *John King*) will learn from the opinion of *Thomas Denman*, Esq., the Common Serjeant of *London*, who, as one of the metropolitan Judges, may be supposed competent to decide that question. Permit me (meaning the defendant), however, first to lay before you (meaning the said *John Kello*, *Robert Garrett*, and *John King*) the case which has been submitted to that learned gentleman (meaning the said *Tho-*

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mas Denman), the facts of which can be substantiated upon oath.

" 'Case:—*Samuel Blackburn* (meaning the plaintiff) being indebted to Mr. *Blackley* (meaning the said *James Blackley)* of *Canterbury*, in the sum of *20l.* 9*s.*, for goods sold, gave to him (meaning the said *James Blackley)* the following bill (meaning the aforesaid bill of exchange):—

£20:9:0. *London, July* 28th. 1814.

Two months after date, pay to me, or my order, the sum of twenty pounds, nine shillings, sterling.

Saml. Blackburn.

Accepted, Saml. Blackburn.

To Mr. Saml. Blackburn,
126, *Minories.*

" 'The bill and acceptance (meaning the aforesaid bill of exchange, and the acceptance thereof) are in the handwriting of the drawer (meaning the plaintiff), who, at the time he (meaning the plaintiff) gave the bill (meaning the aforesaid bill of exchange), represented to Mr. *Blackley* (meaning the said *James Blackley*), that Mr. *Samuel Blackburn*, the pretended acceptor, was his (meaning the plaintiff's) uncle, and in the receipt of rents for him (meaning the plaintiff). This was in part false; for, although his (meaning the plaintiff's) uncle (meaning the defendant) did live at 126, *Minories*, at which place the bill (meaning the aforesaid bill of exchange) was addressed, his (meaning the defendant's) name was not *Samuel Blackburn*, but *John Blackburn*, and he (meaning the defendant) was not in the receipt of any rents for his nephew (meaning the plaintiff), or indebted to him (meaning the plaintiff) in any sum; nor did he (meaning the defendant) give him (meaning the plaintiff) any authority to draw the bill (meaning the aforesaid bill of exchange) upon him (meaning the de-

fendant). By the day the bill (meaning the aforesaid bill of exchange) became due, *Samuel Blackburn* (meaning the plaintiff) sent to his uncle, *John Blackburn* (meaning the defendant), the amount of the bill (meaning the aforesaid bill of exchange), less nine shillings, which, when presented, was taken up by the uncle (meaning the defendant), with the money sent him (meaning the defendant) by the nephew (meaning the plaintiff), for that purpose: and the bill (meaning the aforesaid bill of exchange) is now in the possession of the uncle (meaning the defendant). It will be perceived, that the transaction took place near thirteen years since: but circumstances have recently transpired, which make it necessary for the uncle of the drawer and acceptor of the bill (meaning the aforesaid bill of exchange) to take opinion upon the following points. On this case Mr. *Denman's* opinion was requested on several points; but it is only necessary for me (meaning the defendant) to state to you (meaning the said *John Kello*, *Robert Garrett*, and *John King*) the first question proposed. *First*, whether the acceptance was a forgery of *Samuel Blackburn* (meaning the plaintiff), he (meaning the plaintiff) drawing and accepting the bill (meaning the aforesaid bill of exchange), and negotiating the same under the false representation before mentioned. *Answer.*—On the principle of *Mead* v. *Young*, 4 Term Rep. 28, I (meaning the said *Thomas Denman*) think the acceptance written on the bill (meaning the aforesaid bill of exchange), under the circumstances stated, was a forgery. To this measure have I (meaning the defendant) been driven, in my (meaning the defendant's) own defence, by your (meaning the said *John Kello*, *Robert Garrett*, and *John King's*) indiscreet zeal, and with you (meaning the said *John Kello*, *Robert Garrett*, and *John King*) must rest all the consequences of this exposure. I (meaning the defendant) presume, however, gentlemen (meaning the said *John Kello*, *Robert Garrett*, and *John King*), that this judicial opin-

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ion (meaning the aforesaid opinion of the said *Thomas Denman*) will cause you (meaning the said *John Kello*, *Robert Garrett*, and *John King*) to feel that the statement to which you (meaning the said *John Kello*, *Robert Garrett*, and *John King*) have lent your (meaning the said *John Kello*, *Robert Garrett*, and *John King's*) sanction (meaning the said statement, printed, published, and circulated, as aforesaid), that the whole transaction was honourable and regular, is somewhat doubtful, and that your (meaning the said *John Kello*, *Robert Garrett*, and *John King's*) charges of imposition and evil disposition are as groundless as they are injurious.'—And in another part of which said libel, there was, and is, contained the false, scandalous, malicious, defamatory, and libellous words and matter following, of and concerning the plaintiff, (that is to say)—'Respecting your reverend friend (meaning the plaintiff), I (meaning the defendant) wish only to add, that if he (meaning the plaintiff) were prepared, with the ingenuousness of christian repentance, to confess his (meaning the plaintiff's) past indiscretions and sins, no one would rejoice more sincerely in the evidence of his (meaning the plaintiff's) penitence, and in the prospect of his (meaning the plaintiff's) usefulness, than myself (meaning the defendant); but if he (meaning the plaintiff) proudly denies facts which are notoriously true, I (meaning the defendant) can only anticipate that he (meaning the plaintiff) will be found like evil men and seducers who wax worse and worse.'—And the defendant, further contriving and intending as aforesaid, then and there, to wit, on &c. last aforesaid, at &c. aforesaid, enclosed the said libel in an envelope directed to the said *Robert Garrett* (by the name and description of Mr. *Garrett, Cambridge Heath*), and then and there sent the said libel, so enclosed as aforesaid, to the said *Robert Garrett*, and thereby, then and there, published the same."

The *second* count set out part of the libel, with the

innuendoes as in the last count, commencing with the words, " Let me then, in the first place, remind you," and ending with the words, " includes both falsehood and fraud."

The *third* count stated the libel as follows:—" If you recollect, I cautioned your reverend friend respecting the consequences, because I believed it (meaning the bill) to be fraudulent in its character, and might involve penal results of no desirable kind. How far my impressions were correct, you will learn from the opinion of *Thomas Denman*, Esq., the Common Serjeant of *London*, who, as one of the metropolitan Judges, may be supposed competent to decide that question. Permit me, however, first to lay before you the case which has been submitted to that learned gentleman, the facts of which can be substantiated on oath." It then set out so much of the case and opinion as are stated in the first count, and concluded with setting out the following passage:—" To this measure have I been driven, in my own defence, by your indiscreet zeal; and with you must rest all the consequences of this exposure. I presume, however, gentlemen, that this judicial opinion will cause you to feel that the statement to which you have lent your sanction, that the whole transaction was honourable and regular, is somewhat doubtful; and that your charges of 'imposition and evil disposition' are as groundless as they are injurious."

The *fourth* count only set out the case and opinion, as before, and concluded with stating special damage from the loss of the plaintiff's friends and acquaintance through the charge and imputation of forgery.

To this declaration, the defendant pleaded, *first*, the general issue.

Secondly, " as to so much, and such parts, of the said supposed libel, in the declaration mentioned, as relate to the plaintiff having committed, and as charge him with

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having committed, and been guilty of, forgery and fraud, with regard to, and in respect of, a bill of exchange, drawn by the plaintiff, and as to such parts of the said supposed libel as contain a charge, and imputation, that the plaintiff was, and is, a person of questionable character, the defendant said, that long before the said several times, when &c., or either of them, to wit, on the said 28th *July*, 1814, he (the plaintiff) made and drew his certain bill of exchange in writing, bearing date &c., and then and there addressed, and directed, the said bill, as follows: 'To Mr. *Samuel Blackburn*, 126, *Minories, London;*' and thereby the plaintiff then and there requested such last-mentioned supposed Mr. *Samuel Blackburn*, 126, *Minories, London*, two months after the date thereof, to pay to him, the plaintiff, or order, the sum of twenty pounds, nine shillings, sterling." The defendant then averred, "that the plaintiff afterwards, to wit, on &c. aforesaid, at &c., aforesaid, with force and arms, feloniously did falsely make, forge, and counterfeit, and cause and procure to be falsely made, forged, and counterfeited, and willingly aid and assist in the false making, forging, and counterfeiting, on the said last-mentioned bill, an acceptance of the said last-mentioned bill, which said false, forged, and counterfeited acceptance was as follows, (that is to say)— 'Accepted, *Samuel Blackburn*,' thereby meaning the said last-mentioned supposed Mr. *Samuel Blackburn*, 126, *Minories, London*, with intention to defraud the said *James Blackley*, in the said declaration mentioned; against the form of the statute; and that the plaintiff was, then and there, indebted to the said *James Blackley*, in the sum of 20*l.* 9*s.* for goods sold, and otherwise, and, then and there, gave and indorsed the said last-mentioned bill, with such counterfeited acceptance, on account thereof, to the said *James Blackley*, and, at the same time, fraudulently and falsely represented to the said *James Blackley*, that the said last-mentioned supposed acceptor

of the said last-mentioned bill, was his (the plaintiff's) uncle, and in receipt of rents for him (the plaintiff); whereas, in truth and in fact, the said last-mentioned supposed acceptor was not the plaintiff's uncle, or in receipt of rents for him (the plaintiff); nor had he (the plaintiff) any uncle of the name of *Samuel Blackburn*, or any authority to accept the said last-mentioned bill in manner aforesaid: and the said last-mentioned supposed acceptor was altogether a fictitious person, as the plaintiff well knew. And that he (the defendant) did, afterwards, to wit, on &c., at &c. aforesaid, state the said case, in the said first count mentioned, for the opinion of the said Mr. *Thomas Denman*, with respect to the said last-mentioned bill; and that the said Mr. *Denman* did, thereupon, then and there write and give the opinion in the said first count in that behalf mentioned, and in the said supposed libel, therein set forth, alleged to have been written and given by him. Wherefore the defendant, at the said several times when &c., did compose and publish &c., as he lawfully might &c."

Thirdly, "as to the last count of the declaration, the defendant pleaded, "that, before the writing and publishing of the said supposed libel, in that count mentioned, the plaintiff was indebted to one *James Blackley* in a certain sum of money, to wit, the sum of 20*l.* 9*s.*, and it was agreed, by and between the plaintiff and the said *James Blackley*, that the plaintiff, on account of the said last-mentioned debt, should indorse and deliver the bill of exchange thereinafter next mentioned, to the said last-mentioned *James Blackley*; and, thereupon, the plaintiff indorsed to the said last-mentioned *James Blackley* a certain bill of exchange, in writing, bearing date &c. aforesaid, the same being addressed 'to Mr. *Samuel Blackburn*, 126, *Minories*, *London*,' and purporting to be accepted by him, and at the time of indorsing and delivering such bill of exchange, as aforesaid, to the said *James Blackley*, he (the plaintiff) fraudulently, and falsely, re-

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presented to the said *James Blackley*, that the person to whom the said last-mentioned bill of exchange was addressed, was the uncle of him, the plaintiff, and resided at the place mentioned in the said last-mentioned bill of exchange, and was in the habit of collecting rents of and for him, the plaintiff, and, by false and fraudulent means and pretences, induced the said *James Blackley* to believe (and he did then and there in consequence believe), that the said last-mentioned *Samuel Blackburn*, the person to whom such bill of exchange was addressed, and by whom the same purported to be accepted, as aforesaid, was, in truth and in fact, the uncle of the plaintiff, and was in the habit of collecting the rents of and for the plaintiff, and had authorized the plaintiff to draw such bill of exchange on him, the said last-mentioned *Samuel Blackburn*, 126, *Minories*." The defendant then averred, "that, in truth and in fact, the said *Samuel Blackburn*, in the said last-mentioned bill of exchange mentioned, and to whom the said bill of exchange was addressed, as aforesaid, was not the uncle of the plaintiff, but was altogether a fictitious person, as the plaintiff well knew."

Fourthly, "as to so much of the supposed libel, in the first count mentioned, as contains an imputation of misconduct on the part of the plaintiff, with regard to the bill of exchange in the said last-mentioned supposed libel and first count mentioned and set forth, that the plaintiff, before the said time when, &c. in the said first count mentioned, to wit, on &c. did make and draw, accept and indorse, the said last-mentioned bill of exchange, as in the said last-mentioned supposed libel is stated; and that the said several matters, stated and set forth in the said last-mentioned supposed libel, with regard to the said plaintiff's conduct in respect to such last-mentioned bill, were and are true; and the said last-mentioned supposed libel contains a true and full statement in that behalf."

The plaintiff replied, "*De injuriâ*," on which issue was joined.

At the trial, before Mr. Justice *Gaselee*, at *Guildhall*, at the Sittings after the last Term, it appeared, that the plaintiff was a dissenting minister, of the sect called *Independents;* that he was, at the time of the publication of the libel, one of the ministers of a congregation of that persuasion, at *Bethnal-Green*, and that the defendant was his uncle.

The transaction which gave rise to the libel was as follows:—The plaintiff, whilst living, and officiating in his character of a minister, in the neighbourhood of *Canterbury*, became indebted to *James Blackley*, a shoe-maker living there; and when about to quit *Canterbury* and return to *London*, gave him, in payment, a bill drawn, accepted, and made payable at his uncle's residence, in the form stated in the libel, which he indorsed to *Blackley*. Before the bill arrived at maturity, the plaintiff wrote to the defendant the following letter, enclosing 20*l.*

Hempsted, September 28th, 1814.

" Dear Sir,—Previously to my leaving *Canterbury*, I had occasion to give a bill for 20*l.* 9*s.*, which I made payable at your house. Inclosed, you will receive 20*l.*; I will be obliged by your taking up the bill, and taking care of it till I come to town, when I will pay you the nine shillings.

" Please to present my best respects to my aunt, and my love to the children. I hope to be able to spend a few days in town before long, when I shall have the pleasure of seeing you. I remain, &c.

Samuel Blackburn."

Towards the close of the year 1815, family disputes caused a coolness, and cessation of intercourse, between the plaintiff and defendant, and they had no direct communication, from that period, until the meeting mentioned in the printed circular. In *August*, 1826, the plaintiff was invited to preach a sermon at the *Bethnal-Green* Meeting; and this introduction led to his appoint-

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ment, as an assistant minister, at that chapel. Shortly afterwards, the reports were sent forth, which gave rise to the circular, in answer to which the libel complained of appeared. These reports being traced to the defendant, the plaintiff called upon him, in company with the person who had repeated the slander, Mr. *Sturtevant*, who was then required to apologize for the part he had taken in the matter; which he refusing to do, an action was commenced against him, but subsequently settled, on his making the required apology, and paying the costs.

The circular, addressed to each member of the congregation, adverted to in the first count of the declaration, and to which the apology was added, was in the following words:—

"*Bethnal-Green*, 15th *February*, 1827.

"Dear Sir,—The object for which the following statement is transmitted to you is obvious, and therefore requires no comment. It is sent in the hope that, if the unfounded calumnies it refutes should have reached you, the minister they were designed to injure may be restored to the possession of the unimpeachable reputation, both in the church and in the world, we are persuaded he deserves. We remain, dear Sir, your affectionate friends and servants,

(Signed) *John Kello*, Minister of *Bethnal-Green* Meeting.
Robert Garrett, } Deacons.
John King, }

"The increasing infirmities of the Rev. *John Kello* having rendered it expedient that regular assistance in his public labours should be procured, occasional supplies were engaged for part of the Lord's day, who met with various degrees of acceptance; and some painful differences of opinion having arisen, respecting the right of procuring the assistance, which we all admitted to be necessary, led to the resignation of the

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deaconship by Mr. *Briscoe*. In this state of things, and subsequent to Mr. *Briscoe's* resignation, the Rev. *Samuel Blackburn* was invited, in *August* last, to preach a single sermon, which was so much approved as to induce an immediate application to him, by the Rev. *J. Kello*, and the deacons, for his future services; and thus he was engaged, from sabbath to sabbath, with increasing approbation, until, at the expiration of two months, a meeting of the church and congregation was publicly convened to consider of the propriety of inviting him to supply the pulpit, once on the Lord's day, for a specific period. At this meeting, Mr. *Briscoe* and Mr. *R. L. Sturtevant* were present, and made several vague insinuations against the private character of Mr. *Blackburn*, which led to the postponement of the business for four days, to give time for further enquiries. Having received the most unexceptionable and satisfactory testimonies from those who had known Mr. *Blackburn* intimately for many years, added to the fact, that he had lived, in great respectability, in the immediate neighbourhood, for the last *nine* years, and as the opposing parties absented themselves from the second meeting, by which it might be inferred they admitted their previous opinions to be unfounded; an unanimous invitation for three months was agreed to, and transmitted to Mr. *Blackburn*, signed by the aged minister and deacons, on behalf of the church and congregation. From the increasing number of hearers, and some pleasing indications of usefulness, which had resulted from his ministry during these three months, towards the close of that period, another public meeting was convened, which was more numerously attended than the former, and an invitation for an additional three months was unanimously agreed to. The Rev. *J. Kello*, in conveying to Mr. *Blackburn* the request of the meeting, added, 'if the first invitation was unanimous, the second is enthusiastic.'" The next part of the circular contained those passages which are set out

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in the first count of the declaration, commencing with the words, "It was now that unpleasant rumours, which were traced to Mr. *R. L. Sturtevant*, began to create uneasiness," and ending with the words, "any other meaning." It then concluded as follows:—

"In consideration of Mr. *R. L. Sturtevant's* having received the impression from Mr. *John Blackburn* (though not expressed in language sufficiently explicit to make him legally responsible), and having consented to repair the injury, as much as possible, by publishing this refutation, and offering his apology, the Rev. *S. Blackburn* has consented to forego the legal proceedings he had commenced against him, he having had no object, in taking such a course, but the complete vindication of his character from the aspersions cast upon it.

(Signed) *Robert Garrett*,
John King,
S. Sturtevant.

Witness, *William Brown*.

"I, *Richard L. Sturtevant*, hereby express my deep regret for having been so far imposed on by the representations of Mr. *John Blackburn*, of No. 126, *Minories*, (the uncle of the Rev. *Samuel Blackburn*), as to make the injurious and unfounded imputations referred to in the foregoing statement, which I admit to be a correct representation of the facts and circumstances it professes to explain; and I sincerely hope it will have the intended effect of completely removing from the said Rev. *S. Blackburn's* character any suspicions which may have attached to it in consequence of such imputations.

Witness, *William Brown*. (Signed) *R. L. Sturtevant*.

Dated this 15th *February*, 1827.

The defendant, in the month of *April* following, stated a case (on the bill transaction), which he laid before the Common Serjeant, Mr. *Denman*, for his opinion, and af-

terwards wrote and sent to the Rev. *John Kello*, and to Messrs. *Garrett* and *King*, copies of the following letter:

"To the Rev. *John Kello*, and Messrs. *Garrett* and *King*, the Pastor and Deacons of the Independent Church at *Bethnal-Green*.

"Gentlemen,—By a printed paper, which you have circulated, bearing the date of 15th *February*, 1827, you have published a statement, respecting my conduct, which is so untrue in point of fact, and so defamatory in its tendency, that I have the assurance of my legal adviser that I could successfully prosecute you for a mischievous libel. I wish not, however, to resort to a mode of justification which, amongst believers, is forbidden by apostolic authority, especially as I anticipate that, when you are in possession of the facts I have to communicate, you will, as becometh Christians, confess your mistake, and retract the injurious statement you have circulated against me. And here permit me to premise that, however it might be insinuated that private and unworthy motives have excited my opposition to the Rev. *S. Blackburn*, I rejoice that I can appeal to the searcher of hearts, my only consideration has been, what may best promote the real interest of truth and holiness, and the real interest of the kingdom of Christ. Indeed, to every considerate mind it must appear reasonable, that I should not needlessly desire to involve one who bears my name, and partakes of my blood, in a reproach which must necessarily lessen the general respectability of my family, in the opinion of all those who may be informed of the exposure. But dear as my name and reputation may be, yet I trust the cause of Christ is still more dear to me; and solicitude for its interest, in connection with your church, has involved me in this most painful, though necessary, explanation." Then followed the passage set out in the declaration, beginning with the words, "Let me, then, in the first place, remind

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you," and ending with the words, "includes both falsehood and fraud." It then continued as follows:—"How far my confidence was betrayed by Mr. *R. L. Sturtevant*, you well know, and that I was compelled to maintain my own veracity by producing the bill in question at the meeting you describe, and which I attended without even a friend to witness for me the statements which were made. The transaction of that evening you thus describe: [Here that part of the printed circular was stated, which begins with the words, "a meeting was arranged," and ends with the words, "any other meaning."] It then proceeded thus:—"I admit your statement in the general, but deny that the reverend gentleman ever resided in my house, or ever slept there more than one night." After this came the part set out in the first count, beginning with the words, "if you recollect," (containing the statement of the case and opinion,) and ending with the words, "groundless as they are injurious." The letter then concluded thus:—"I now, then, solemnly call upon you, as the officers of a church of Christ, who ere long will be our judge, to take those measures which Christian equity demands, to remove from my character those imputations, which, without provocation, you have cast upon it. I do not wish to publish these things to the world; it is fearful enough that the church should hear those things which would make the enemies of godliness to triumph: but from you they could not be withheld. Respecting your reverend friend, I wish only to add, that, if he were prepared, with the ingenuousness of Christian repentance, to confess his past indiscretions and sins, no one would rejoice more sincerely in the evidence of his penitence, and in the prospect of his usefulness, than myself; but if he proudly denies facts which are notoriously true, I can only anticipate, that he will be found, like 'evil men and seducers who wax worse and worse.' Waiting your reply, I am, gentlemen, your faithful servant, (Signed) *John Blackburn.*

Minories, May 19th, 1827."

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There was not any evidence to substantiate the charges against the plaintiff, contained in the libel. For the defendant, a letter was produced, from *Blackley* to him, in answer to one that had been written by him to *Blackley*, a year after the bill was given; which the learned Judge allowed to be read; and in which it was stated that, on the plaintiff's giving *Blackley* the bill, he had represented that it was the acceptance of his uncle, and that his uncle was in the receipt of rents for him; but on *Blackley* being called as a witness, he denied all knowledge of the contents of the letter, and said, that he could not write, and that the letter was written for him by some person whom he did not know; and he further stated, that when he received the bill in question, he received it as the mere acceptance of the plaintiff, and not as the security of a third person. It was then contended, that the letter containing the libel in question was in the nature of a privileged communication, as the defendant was called on to make the statements therein contained, in consequence of the former imputations cast on him by the plaintiff, and that he was not actuated by any malicious motives towards the latter. The learned Judge, however, reserving the question as to whether or not the libel were a privileged communication for the opinion of the Court, left it to the Jury to say, whether or not, under the circumstances, the defendant's pleas were supported by the evidence; and he asked them whether, after such a lapse of time, they could believe the bill to have been a forgery. The Jury said, they thought the pleas were not borne out by the evidence. The learned Judge then said, that the question for their consideration was, whether or not the publication were meant to convey an imputation of forgery; and he said, he thought it not only imputed forgery, but also fraud and misrepresentation; and if so, that the plaintiff was entitled to a verdict, as in such case the law would imply malice: that the Jury could not take into consideration the admissions made by the defendant in his pleas;

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that if the defendant had stopped at the original communication to *Sturtevant*, he could not have been charged with libelling the plaintiff; but that the printed circular did not warrant the libel, nor make it privileged, particularly as it contained substantive statements not before made, *viz.* the case laid before the Common Serjeant for his opinion, and the alleged communications from the country. But, least the Court should be of opinion, that the defendant's letter was a privileged communication, he requested them to state, whether or not they thought that he was actuated by express malice; reminding them, that, if malicious, it could not be privileged; and also, that, if the letter were written with intent to charge the plaintiff with forgery, the law would imply malice: and he further told them, that he thought they might, in estimating the damages, consider the provocation which the defendant had himself received. The Jury found that the libel did impute forgery to the plaintiff, but that the defendant was not actuated by any *express* malice; and they gave a verdict for the plaintiff— Damages 50*l.*

Mr. Serjeant *Cross* had, on a former day in this Term, obtained a rule, calling on the plaintiff to shew cause why the verdict should not be entered for the defendant on the general issue, and for the plaintiff on the special pleas, and the award of damages set aside; or why the verdict should not be set aside, and a new trial had. He submitted, that the verdict was, in effect, a verdict on the general issue; that it acquitted the plaintiff of the imputation of forgery, and the defendant of the charge of malice; that malice was the gist of every action of this nature, and that, as the Jury had found that there was no malice, there could be no cause of action; and that there is no distinction in law between express and implied malice in this respect. The plaintiff being a candidate for the office of preacher to a congregation of Independents, enquiry was made as

to his character; and the defendant, being asked by an old friend respecting his nephew, the plaintiff, stated to him, in confidence, the facts of the bill transaction, which was disclosed by that person to others of the congregation. In consequence a meeting was had, to give the plaintiff an opportunity of explaining the affair; at which meeting the defendant again related the circumstance, and produced the bill. The plaintiff afterwards caused a circular to be printed and distributed, alleging that the defendant had grossly slandered him; to which the defendant wrote an answer, in his own vindication, sending copies of it only to those persons whose names appeared to the circular, and by whom it was authorized. He contended, that, although a libel, on the face of it, may imply malice, yet such inference may be rebutted by evidence; and that as the jury had expressly negatived malice, the verdict would operate as an acquittal; or that, at all events, it was so imperfect as to warrant the Court in sending the case to another Jury.

Mr. Serjeant *Wilde*, on a subsequent day, also obtained a rule *nisi* for a new trial, on the grounds, *first*, that the letter from the witness *Blackley*, written in *September*, 1815, a year after the bill became due, was improperly received in evidence, and that it materially influenced the Jury in giving their verdict; and *secondly*, that the circumstances of the length of time suffered to elapse before the opinion of the Common Serjeant was taken, and the concealment, in the defendant's letter, of that part of Mr. *Denman's* opinion, which was favourable to the plaintiff, were so strong evidence of *express* malice, that the finding of the Jury, negativing it, was against the weight of evidence.

The Court directed both rules to come on together, and, on this day—

Mr. Serjeant *Wilde* shewed cause against the rule ob-

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tained by Mr. Serjeant *Cross*.—Two questions arise on the first part of this rule, as to entering a verdict for the defendant on the general issue, *viz. first*, whether or not the letter which contained the libel in question, were in the nature of a confidential or privileged communication by the author or publisher; and, *secondly*, whether or not express malice be necessary to be proved, in order to support an action for a libel. As to the *first* point, the action was not brought for any communication made to the deacons, or to *Sturtevant*, prior to the publication of the printed statement; but was confined to the letter written by the defendant on the 19th *May*, 1827. The other facts were merely introduced in the declaration, by way of inducement, to explain the meaning of the libel. The facts were these:—the plaintiff had lived nine years in the immediate neighbourhood of the chapel, and wished to preach there, the congregation being in want of an assistant minister. Enquiries were made touching his character, which being satisfactorily answered, he was appointed. The plaintiff having learned that a Mr. *Sturtevant* had circulated reports to his discredit, called on him, with a view to ascertain from whence they had originated, when *Sturtevant* named the defendant as the author of the slander; and the latter, to excuse himself, stated that he had made the communication in confidence to the former. The deacons of the congregation, in consequence, called a meeting of its members; and a written statement was afterwards published by them, for the purpose of exonerating the plaintiff from the charges that had been maliciously brought against him. An action, which had been commenced against *Sturtevant*, was discontinued, on his apologizing, and declaring his belief that the slander was unfounded. Three months after the publication of the circular, by the deacons, the libel in question was written and sent to them, by the defendant, under pretence of clearing himself from the suspicion of having defamed the plaintiff

without cause; thus reiterating the charge of forgery. That, therefore, could not be taken to be a privileged communication. As to the *second* point, whether or not it be incumbent on the plaintiff to shew, in order to support this action, that the defendant was actuated by *express* malice, it is unnecessary to go at large into that question, as a malicious intent was clearly apparent on the face of the letter; for, the avowed purpose of the defendant in writing it was to fasten the charge of forgery on the plaintiff on the authority of a legal opinion, which, to give more weight to it, he thought proper to call a *judicial* one.

[Mr. Justice *Park*.—It is a strong fact in implication of malice, that the defendant suppressed the most material parts of the Common Serjeant's opinion.]

The libel only contained the *first* question put to Mr. *Denman*, with his answer thereto; the *second*, *third*, and *fourth*, were omitted, as they were calculated to neutralize the injurious effects of the *first*. They were as follows:—

" *Second question.*—Whether, if it (meaning the bill) was not a forgery, it was an offence indictable at common law, for obtaining money under false pretences?

Answer.—Neither at common law, nor under the statute 30 *Geo.* 3, because the money appears not to have been obtained through the medium of the bill, but due before.

Third question.—If the acceptance was a forgery, could the latter course have been adopted so as to have avoided the necessity of indicting capitally?

Answer.—I rather think that this could not have been done, as the misdemeanor would merge in the felony; but the line of distinction is sometimes very difficult to trace.

Fourth question.—Will the lapse of time prevent the parties from now proceeding in either way?

Answer.—Lapse of time is not effectually a bar; but it would furnish strong ground for suspecting the evidence, and giving it every construction favourable to the prisoner;

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so that I could not, under any circumstances, now recommend a prosecution."

The defendant's using a part of the opinion only, to shew, as he said, that he was not influenced by any malicious or vindictive feeling, and to persuade the deacons that he could have prosecuted the plaintiff, but had forborne to do so; clearly demonstrates that the libel was conceived in malice. It is a general rule of law, that if a man do an act wilfully, so as to produce an injury to another, he is liable to an action; and if the act itself be wilful, it is not necessary that the injury should also be wilful. In applying that principle to the case of libel, if the charge be wilful, the party is bound to repair the injury done; and without a legal cause being shewn, the law will imply malice. In *Bromage* v. *Prosser* (*a*), it was held, that, although malice was the gist of the action for slander, there were two sorts of malice, malice in fact, and malice in law; the former denoting an act done from ill will towards an individual; the latter a wrongful act intentionally done, without any just cause or excuse; and that, in ordinary actions for slander, malice in law was to be inferred from the publishing the slanderous matter, the act itself being wrongful and intentional, and without any just cause or excuse. Mr. Justice *Bayley*, in delivering the judgment of the Court in that case, said (*b*), "if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not, and if I had no legal excuse for the slander, why is he not to have a remedy against me, for the injury it produces?" Here, however, there can be no doubt of the intention of the defendant, or that the plaintiff has sustained an injury by the publication of the letter in which the libel is contained.

(*a*) 4 Barn. & Cres. 247. *S. C.* 6 Dowl. & Ryl. 296.

(*b*) 4 Barn & Cress. 255.

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Mr. Serjeant *Cross*, in support of his rule.—The plaintiff's character, as well as that of the defendant, remains unimpeached. The Jury have found that the former was not guilty of forgery, and they have also acquitted the latter of any malicious motive. The original communication made by the defendant to *Sturtevant*, was clearly confidential. Nothing new was stated in the letter containing the libel complained of. It was, in fact, no more than a private answer to the circular published on behalf of the plaintiff, and addressed to the individuals from whom that circular purported to emanate. Is there a malicious motive to be imputed to the defendant by the publication of this letter? It has always been held that malice is the gist of an action of this nature, and there is no valid or legal distinction between *malice express* and malice implied; the only difference is, that the one is apparent, the other latent; and the evidence, as to the one, is direct, as to the other, inferential. The one cannot be for the Jury to determine, and the *other* for the Court. Malice may be rebutted, whether express or implied, or may be proved, by direct or circumstantial evidence; but the whole question of malice is always within the province of the Jury; and if they find, either in an action for libel or slander, that a party has not been actuated by malicious motives, it is *damnum absque injuriâ*. In *Buller's Nisi Prius*, it is said (*a*) that, where words are spoken in confidence and without malice, no action lies; and the case of *Edmonson* v. *Stevenson* (*b*), is referred to, which was an action brought by a female servant against her former mistress, for saying to a lady who came to enquire for the plaintiff's character, that she was saucy and impertinent, and often lay out of her own bed; but was a clean girl, and could do her work well; and there, though the plaintiff proved that she was by this means prevented from getting a place; yet, Lord *Mansfield*

(*a*) 7th Edit. by Bridgman, 8. (*b*) B. T. 6 Geo. 3, K. B.

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said, "this is not to be considered as an action in the common way for defamation by words, but the gist of it must be malice, which is not implied from the occasion of speaking, but should be directly proved; this was a confidential declaration, and ought not to have been disclosed." In *Herver* v. *Dowson* (*a*), which was an action against a person for saying of the plaintiff, a tradesman, "he cannot stand it long, he will be a bankrupt soon;" and special damage was laid in the declaration, *viz.* that one *Lane* refused to trust the plaintiff for a horse; *Lane*, the person named in the declaration, was the only witness called for the plaintiff; and it appearing on his evidence that the words were not spoken maliciously, but in confidence and friendship to him, *Lane*, and by way of warning to him, and that in consequence of that advice he did not trust the plaintiff with the horse—Lord Chief Justice *Pratt* directed the Jury, that though the words were otherwise actionable; yet, if they should be of opinion that they were not spoken out of malice, but in the manner before mentioned, they ought to find the defendant not guilty; and they did so accordingly. So, in *Smith* v. *Richardson* (*b*), which was an action for slander, and the words spoken amounted to a charge of felony, it was held that the defendant might give in evidence, the manner and occasion of speaking the words, in mitigation; and in *Crawford* v. *Middleton* (*c*), where it was proved that words were spoken through sorrow and concern, and not maliciously, the plaintiff was nonsuited. Therefore *express* malice alone is the gist of the action: and in *Blackstone's Commentaries* (*d*), it is said, "words spoken in a friendly manner, as by way of advice, admonition, or concern, without any tincture or circumstance of ill-will, are not actionable, as they are not maliciously

(*a*) Bull. Ni. Pri. 8.

(*b*) Com. Rep. 552; *S. C.* Barnes, 195; Bull. Ni. Pri. 9.

(*c*) 1 Lev. 82; *S. C.* Bull. Ni. Pri. 9.

(*d*) Vol. 3, p. 125.

spoken;" and Mr. *Christian* states by way of illustration (*a*), that "no action can be maintained for words, even attended with a special damage, if they were spoken from friendship or justice to another, and not from malice towards the person who is the subject of them; as if upon an enquiry being made, a master is obliged to give an unfavourable character of a discarded servant;" and he refers to the case of *Weatherston* v. *Hawkins* (*b*), where it was held, that a servant cannot maintain an action against his former master, for words spoken, or a letter written, by him, in giving a character of the servant, unless the latter prove *malice*, as well as the *falsehood*, of the charge: and Lord *Mansfield* there said, "to every libel there may be a necessary and implied justification from the occasion; so that what, taken abstractedly, would be a publication, may, from the occasion, prove to be none." So, here, a repetition to two or three persons, of what had before been confidentially communicated to them, cannot be actionable; and more particularly so, where a Jury has expressly negatived the existence of malice in fact. The defendant, therefore, is entitled to a verdict on the general issue, unless the Court should be of opinion that there ought to be a new trial.

Mr. Justice PARK.—This case has been very fully and ably argued. I feel no difficulty as to the result, and am of opinion, that there ought not to be a new trial. The case was most properly left to the Jury. As to the question, whether or not the communication were made under such circumstances as to render it privileged—I think my brother *Cross* has not taken an accurate view of the doctrine, as laid down in the books on this subject. It is quite clear that a communication is privileged, when made *bonâ fide*, and touching the character of a servant, or the

(*a*) Id. n. (*b*) 1 Term Rep. 110.

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circumstances of a merchant or tradesman; in which cases it is necessary to prove that the expressions used were *malicious* as well as *false*. As to whether a communication be privileged or not, is a matter of fact; and if it be privileged, it is incumbent on the plaintiff, not only to shew the circumstances under which it was made, but also that the party making the communication acted from malicious motives. In *Bromage* v. *Prosser*, Mr. Justice *Bayley*, in delivering the judgment of the Court, said (*a*), "in actions for such slander as is *primâ facie* excusable on account of the cause of speaking or writing it, as in the case of servants' characters, confidential advice or communications to persons who ask it, or have a right to expect it, malice in fact must be proved by the plaintiff; and in *Edmonson* v. *Stevenson*, Lord *Mansfield* takes the distinction between these and ordinary actions of slander. In *Weatherston* v. *Hawkins*, where a master, who had given a servant a character which prevented his being hired, gave his brother-in-law, who applied to him upon the subject, a detail, by letter, of certain instances in which the servant had defrauded him; *Wood*, who argued for the plaintiff, insisted, that this case did not differ from the case of common libels; that it had the two essential ingredients, slander and falsehood; that it was not necessary to prove express malice; if the matter is slanderous, malice is implied, it is sufficient to prove publication; the motives of the party publishing are never gone into; and that the same doctrine held in actions for words, no express malice need be proved. Lord *Mansfield* said, the general rules are laid down as Mr. *Wood* has stated; but to every libel there may be an implied justification from the occasion." So here, the original conversation between the defendant and *Sturtevant*, as to whether or not the plaintiff were a fit person to be elected pastor to the congregation, was privileged,

(*a*) 4 Barn. & Cres. 256.

and extended to *Sturtevant's* communication to the meeting; and if it had rested there, the plaintiff would have no just ground of complaint. But, in the letter containing the libel, new facts appeared; and a person ought not to be allowed to publish invidious aspersions on another at so long a period from the cause of the original complaint. The letter from *Blackley* appears to have been written a year after the bill in question became due; and the defendant, in the libel, said that he had received statements from various places reflecting on the plaintiff's honour, but that he could *not prove* them. The Jury, therefore, might have been warranted in finding *express* malice; at all events, the question was most properly left to them, whether or not the defendant had been actuated by *express* malice; and if they had found that he was, there would have been an end of the question. If the act of the party be voluntary, and without any reasonable excuse, the law will imply malice. This is certainly a most singular case. The plaintiff, being the nephew of the defendant, drew a bill on himself, and accepted and made it payable at his uncle's house, 126, *Minories*. It does not, however, appear that he meditated any fraud at the time. He might have represented to the person to whom he gave it, that he resided there. Besides, his uncle's name was *John;* and he would not have been obliged to take up the bill. The plaintiff remitted 20*l.* to meet it four days before the bill became due, and stated, that he would pay the remaining nine shillings when he came to Town, which would be before long; and yet the letter was not received from the party to whom the bill was given, until *twelve months* after that period; and *fourteen years* afterwards, when the congregation were most enthusiastic to have the plaintiff for their preacher, the defendant endeavoured to destroy his reputation. *Sturtevant* should either have related all the uncle told him, or not; but at the first meeting he said, that the defendant told him that the plaintiff had put his name to a bill for 20*l.*, which he was obliged to pay, for fear of his nephew's being

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prosecuted; but he did not state that the amount of the bill, all but *nine shillings*, had been transmitted to the defendant before it arrived at maturity. Two months after the publication of the circular, the defendant took the opinion of Mr. *Denman*, on a case, in which *four* questions were submitted to him, the last of which was, whether the lapse of time would prevent the parties from now prosecuting; to which the Common Serjeant answered, that he could not, under any circumstances, now recommend a prosecution. The defendant, not content with this, a month afterwards writes the letter in question, in which he states, that he has taken the opinion of one of the Metropolitan Judges. This appears to me to be a gross aberration of conduct; and the defendant confined his statement, as to the answer of Mr. *Denman*, to one of the questions only, *viz.*, that the acceptance was a forgery; altogether omitting the answers to the three subsequent questions, by which that statement was qualified. The circular was printed in *February*, and the letter in question was not written until the month of *May* following; and I am clearly of opinion, that it contains a most foul libel on the plaintiff. Although the first communication might be privileged, yet the defendant had no right to reiterate the slander, or to continue vilifying the character or reputation of the plaintiff. If a person give a character of a servant, it is at first privileged; but if he afterwards say he will ruin such servant, it is not so. The Jury have most properly found, that the libel imputed forgery to the plaintiff; and the only objection I can see to their verdict is, that the damages are far too small. My brother *Gaselee*, who is absent at chambers, has requested me to state his perfect concurrence.

Mr. Justice BURROUGH.—I am of opinion, that, on the facts of this case, there is no colour to disturb the verdict, or to require a further investigation. The complaint was originally made before the deacons, when the

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plaintiff was charged with having committed the crime of forgery. The letter containing the libel not only reiterated that charge, but the defendant also stated that he had taken the opinion of Mr. *Denman*, who thought the acceptance to be a forgery, but suppressed what that gentleman said in continuation, that he could not recommend a prosecution: and, on the present action being brought, the defendant has put two pleas of justification on the record, in one of which he charges the plaintiff with having committed a capital offence, and in the other with fraud, neither of which has been borne out. It appears to me, that the verdict is proper in every respect. There is no pretence for saying that the letter containing the libel, considering the circumstances under which it was written, is in the nature of a privileged communication, and the cases cited from *Buller's Nisi Prius*, as to giving characters of servants, in one of which Lord *Mansfield* said, "this is not to be considered as an action in the common way, for defamation by words, but the gist of it must be malice," do not apply. A master, in giving a servant a character, must give a true one; and if he give a false one, the law will imply malice. In an action for a libel, or for slander, if no justification be pleaded, it is not necessary to prove malice, as, if the words be injurious in themselves, malice is inferred; but if a justification be pleaded, shewing the truth of the libel, it takes away the gist of the charge. I concur with my Brother *Park*, in thinking that the damages found by the Jury are far too small. Both these rules, therefore, must be—

Discharged.

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Tuesday, Nov. 20th.

CARPENTER, Assignee of THOMAS CRESSWELL, a Bankrupt, *v.* HENRY RICHARD CRESSWELL.

[M. T. 8 G. 4. Roll 306.]

By an indenture, reciting that *A.* had for many years carried on the business of a fish-factor and salesman, and had an interest in certain fisheries in *Scotland*, it was witnessed that he had, in consideration of the covenants thereinafter contained on the part of *B.*, sold and assigned to him all that branch of his trade which consisted of the sale, &c. of dried and cured fish, *and also* his interest in the fisheries in *Scotland*; and *A.* further covenanted that he would not in any manner interfere with that branch of the business so assigned; and *B.* covenanted that, in consideration of the assignments and covenants of *A.* he would pay him an annuity of 250*l.* In an action of debt for non-payment of the annuity, *B.* pleaded in bar, that *A.* did interfere with the trade assigned by him to *B.*—Held bad, on demurrer, as the covenant by *B.*, to pay the annuity, and that by *A.*, not to interfere with the trade, were independent and distinct covenants, for the breach of either of which separate actions might be maintained; and that *A.*'s covenant not to interfere, could not be considered as a condition precedent, as it formed only a part of the consideration for the annuity.

THIS was an action of debt.—The first count of the declaration stated, that heretofore, and before *Thomas Cresswell* became bankrupt, to wit, on the 28th *Oct.* 1825, at &c., by a certain indenture, then and there made between the said *Thomas Cresswell* of the one part, and the defendant of the other part (which the plaintiff brought into Court), he, the defendant, did covenant, promise, and agree, to and with the said *Thomas Cresswell*, his executors, administrators, and assigns, that he, the defendant, his heirs, executors, or administrators, should and would, from time to time, and at all times thereafter, during the then remainder of the life of the said *Thomas Cresswell*, well and truly pay, or cause to be paid, unto the said *Thomas Cresswell*, and his assigns, one clear annuity, or yearly sum, of 250*l.* of lawful *English* money, by four equal quarterly payments (that is to say), on &c., &c., in every year, during the then remainder of the life of the said *Thomas Cresswell*, without any deduction, defalcation, or abatement, out of the same annuity, or any part thereof, for, or in respect of, taxes, or otherwise howsoever, as by the said indenture (reference being thereunto had) will (amongst other things) more fully appear. The plaintiff then assigned for breach—that after the making of the said indenture, and during the life, and *after the bankruptcy*, of the said *Thomas Cresswell*, to wit, on &c., at &c., a large sum of money, to wit, the sum of 62*l.* 10*s.* of lawful money &c., of the said annuity or yearly sum, for one quarter of a year, which expired on the day and year

last aforesaid, became and was due and owing from the defendant to the plaintiff as assignee as aforesaid, and still is in arrear and unpaid, contrary to the form and effect of the said indenture, and of the said covenant of the defendant, so by him in that behalf made as aforesaid, to wit, at &c. aforesaid: whereby an action hath accrued, &c.—There were other counts for lands bargained and sold, goods sold and delivered, the money counts, and an account stated with *Thomas Cresswell*, before, and with the plaintiffs, as his assignees, since, he became bankrupt.

The defendant pleaded, *first*, *non est factum;* craving oyer of the indenture, which was set out as follows:—

"This indenture, made the 28th *October*, 1825, between *Thomas Cresswell*, of *Billingsgate*, in the city of *London*, fish-factor, of the one part, and *Henry Richard Cresswell*, of *Billingsgate* aforesaid, fishmonger (the son of the said *Thomas Cresswell*), of the other part:—Whereas the said *Thomas Cresswell* hath for many years past carried on and conducted the trade or business of a fish-factor, fish-salesman, and fishmonger, at *Billingsgate* aforesaid, one branch of which trade consists of selling fresh fish, namely, salmon, soles, cod, turbot, &c., consigned to him, for sale by commission, in certain fishing smacks, and by land-carriage, together with such fish as is salted or cured on board such smacks during their respective voyages; and the other branch of which trade consists of the purchasing at, and receiving consignments of dry or cured fish, from *Scotland*, *Yarmouth*, *Lowestoff*, and elsewhere, namely, red and white herrings, dry and barrelled cod, &c. &c. which are sold by the said *Thomas Cresswell* at or in his shop, and in the *London* market, and for exportation:—And whereas the said *Thomas Cresswell* is, conjointly with *Robert Waugh*, possessed of, and interested in, certain salmon fisheries on the rivers *Biora*, *Naver*, and *Helmsdale*, in *Sutherland-*

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shire, in the kingdom of *Scotland*, holden by them under the most noble the Marquis of *Stafford*, for a term or period of which *three* years were unexpired in the month of *August* last:—And whereas the said *Thomas Cresswell* hath proposed and agreed with the said *Henry Richard Cresswell*, to relinquish and give up to him that branch of the trade of the said *Thomas Cresswell*, which consists of the receiving, and the purchase and sale, by him, of the dried and cured fish as aforesaid; and also to assign unto the said *Henry Richard Cresswell* the right, term, and interest, of the said *Thomas Cresswell*, of and in the said salmon fisheries as aforesaid, in consideration of the said *Henry Richard Cresswell* securing unto the said *Thomas Cresswell* a clear annuity, or yearly sum, of 250*l.*, for the now remainder of his life, to commence from the 1st *November* now next; to which proposition the said *Henry Richard Cresswell* hath consented:—Now, this indenture witnesseth, that in pursuance of, and for effecting the said recited agreement, by and on the part of the said *Thomas Cresswell*, and in consideration of the covenants hereinafter contained, by and on the part of the said *Henry Richard Cresswell*, he, the said *Thomas Cresswell*, hath bargained and sold, released, assigned, transferred, and set over, and by these presents doth bargain and sell, release, assign, transfer, and set over, unto the said *Henry Richard Cresswell*, his executors, administrators, and assigns, all that branch or portion of the trade or business of him the said *Thomas Cresswell*, as now carried on by him at *Billingsgate* aforesaid; consisting of the purchases, receiving consignments, and sales, by him, of all sorts of dried and cured fish, from *Scotland*, *Yarmouth*, *Lowestoff*, and elsewhere, as hereinbefore mentioned and described: and also all that the right and interest of him the said *Thomas Cresswell*, of and in the said salmon fisheries in the rivers *Biora*, *Naver*, and *Helmsdale*, aforesaid, so now holden by him, conjointly with the said *Robert Waugh*, under a lease from the said Marquis of *Stafford*, and all

the right, title, and interest, of him the said *Thomas Cresswell*, as well in equity as at law, of, to, and in the same;—to have, hold, receive, and take the same, unto and by him, the said *Henry Richard Cresswell*, his executors, administrators, and assigns, to and for his and their own proper use and benefit absolutely.—And the said *Thomas Cresswell*, for himself, his heirs, executors, and administrators, doth covenant, promise, and agree, to and with the said *Henry Richard Cresswell*, his executors, administrators, and assigns, by these presents, that he, the said *Thomas Cresswell*, shall not, nor will, at any time hereafter, during the now remainder of his life, either directly, or indirectly, interfere, act in, or intermeddle with, or speculate or deal in, or receive consignments of, or sell, any of the articles which comprise that branch of the trade or business of him the said *Thomas Cresswell*, so intended to be hereby assigned by him unto the said *Henry Richard Cresswell* as aforesaid." Then followed a covenant for further assurance. "And this indenture further witnesseth, that, in consideration of the assignments and covenants hereinbefore made and entered into, by, and on the part of, the said *Thomas Cresswell*, as aforesaid, he, the said *Henry Richard Cresswell*, for himself, his heirs, executors, and administrators, doth covenant, promise, and agree, to and with the said *Thomas Cresswell*, his executors, administrators, and assigns, by these presents, that he, the said *Henry Richard Cresswell, his* heirs, executors, or administrators, shall and will, from time to time, and at all times hereafter, during the now remainder of the life of the said *Thomas Cresswell*, well and truly pay, or cause to be paid, to the said *Thomas Cresswell*, and his assigns, one clear annuity, or yearly sum, of 250*l*., of lawful *English* money, by four equal quarterly payments, that is to say, on &c., &c., in every year, during the now remainder of the life of the said *Thomas Cresswell*, without any deduction, defalcation, or abatement out of

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the said annuity, or any part thereof, for, or in respect of taxes, or otherwise howsoever; and further, that he, the said *Henry Richard Cresswell*, his executors or administrators, shall not and will not at any time hereafter, during the now remainder of the life of the said *Thomas Cresswell*, either directly or indirectly, interfere, act, or intermeddle, with that branch of the fresh fish trade or business of the said *Thomas Cresswell*, which is retained and intended to be carried on by him as aforesaid, or act as a salesman of such fresh fish."—Then followed a proviso, that, in case any disputes or differences should arise between *Thomas Cresswell* in his life-time, and the defendant, they were to be referred to arbitration, and that the award of the arbitrator should be conclusive.

The second plea was as follows:—"And for a further plea in this behalf, as to the matters contained in the said first count of the said declaration, the defendant, by leave, &c., says, *onerari non*, because he says, that, before any part of the said sum of 62*l.* 10*s.* became due, as in the said declaration mentioned, and before the bankruptcy of the said *Thomas Cresswell*, he, the said *Thomas Cresswell*, did directly interfere, act in, and intermeddle, speculate, and deal, in the articles which are comprised in those branches of trade or business by the said indenture assigned and intended to be assigned by the said *Thomas Cresswell* to the defendant as aforesaid, on divers days and times before the bankruptcy, to wit, for the space of one week, from &c., to wit, at &c. aforesaid, against the form and effect of the covenants contained in the said indenture, by the said *Thomas Cresswell*, to be performed and fulfilled. And this &c., wherefore &c." To all the other counts the defendant pleaded *nil debet*.

The plaintiff, as to the second plea of the defendant, as to the matters contained in the first count of the declaration, after protesting that the said *Thomas Cresswell* did not interfere, act, intermeddle, speculate, and deal, as

in the said second plea is alleged, demurred generally; and the defendant joined in demurrer.

The question raised by the demurrer was, whether the bankrupt's interfering with, and dealing in, the business assigned by the deed (by which the annuity sought to be recovered was granted), discharged the defendant from his liability to pay such annuity?

The cause now came on for argument, when Mr. Serjeant *Taddy*, in support of the demurrer, after contending that the covenant by the defendant to pay the annuity was independent of the bankrupt's covenant not to intermeddle with those branches of the business which were assigned to the defendant by the bankrupt; and that such covenant was not a condition precedent, was stopped by the Court, who called on—

Mr. Serjeant *Wilde*, to support the plea. He submitted that it was a general rule in the construction of covenants, that when a covenant goes to the *whole* of the consideration on both sides, it is a condition precedent; but where it does not go to the whole, but only to *a part*, then it is not a condition precedent; and each party must resort to his separate remedy; and for this obvious reason, that the damages might be unequal. No precise words are necessary to constitute a dependent or independent covenant, neither is it material in what part of the deed or instrument they may be found. The meaning and intention of the parties must be looked at, as well as the good sense of the case, and technical words must give way to such intention. Here, the object of the parties to the deed was, that each should take a certain branch or portion of the business distinct and independent of the other, and the deed was framed ancillary to that object. The whole of the consideration for the annuity was the assignment, by the bankrupt to the defendant, of a parti-

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cular branch of the business; and the assignment, made to the latter, of the right or interest of the bankrupt in the fisheries in *Scotland*, formed only part of the means by which the business was to be carried on: and therefore, the covenants are mutual, and dependent on each other. In *Boone* v. *Eyre* (*a*), where the plaintiff conveyed by deed to the defendant the equity of redemption of a plantation in *Dominica*, together with the stock of negroes upon it, in consideration of 500*l.* and an annuity of 160*l.* for life, and covenanted that he had a good title to the plantation, and was lawfully possessed of the negroes, and that the defendant should quietly enjoy:—In an action for non-payment of the annuity, the defendant pleaded that the plaintiff was not, at the time, legally possessed of the negroes on the plantation, and so had not a good title to convey:—such plea was held bad, as the covenant, that the plaintiff was lawfully possessed of the negroes, did not necessarily go to the whole of the consideration, and therefore was not a condition precedent. But in the Duke of *St. Alban's* v. *Shore* (*b*), where, in articles of agreement, under a penalty, there were mutual covenants between *A.* and *B.*, to do certain acts, and also a covenant which went to the *whole* consideration on each side; to an action of debt for the penalty, brought by *A.* against *B.*, on account of the non-performance of his part, it was held, that *B.* might plead in bar a breach by *A.* of the covenant which went to the *whole* consideration. In *Campbell* v. *Jones* (*c*), in an agreement between the plaintiff (the proprietor of a patent) and the defendant, after reciting that it had been agreed between them that the plaintiff should permit the defendant during the continuance of the patent to use it, it was stipulated, that the defendant should pay the plaintiff 500*l.* and that he should teach the defendant

(*a*) 1 Hen. Bl 273, n.; *S. C.* 2 Sir W. Bl. 1312.
(*b*) 1 Hen. Bl. 270. (*c*) 6 Term Rep. 570.

the use of the patent,—it was held, that, as the consideration on the part of the plaintiff was two-fold, *viz.* the transferring to the defendant a right to exercise the patent, and the instructing him, and as the principal part, *viz.* the right to use the patent, had been executed, the plaintiff might sue for the 500*l.* without averring that he had instructed the defendant. *Fothergill* v. *Walton* (*a*), which was decided on the authority of *Storer* v. *Gordon* (*b*), turned entirely on the point, that the covenant was distinct and independent, as it went only to a part of the consideration of the contract between the parties; and in *Glazebrook* v. *Woodrow* (*c*), Mr. Justice *Le Blanc* adverted to the distinction laid down in *Boone* v. *Eyre*, and *Campbell* v. *Jones*, *viz.* where one party having had the advantage of all *the material* part of the agreement, the other has been permitted to sustain his action for the consideration, although there might not have been a literal performance of other parts. Here, however, the interference of the bankrupt in that branch of the trade assigned to the defendant, is a breach which goes to the *whole* of the consideration. A covenant that a ship shall sail with the first wind, or on or before a particular day, is in fact only one covenant, and the voyage may ultimately be performed, and therefore the whole of the consideration is not destroyed by a slight variance in the performance of it; but here the main consideration was, the bankrupt's not interfering in that branch of the trade assigned by him to the defendant. The plea, therefore, that he has interfered with the defendant's trade, is a sufficient answer to this action, particularly as the party assigning has become bankrupt, and it is stated that he was guilty of a breach of covenant, by his interference before the bankruptcy.

(*a*) 2 B. Moore, 630. (*b*) 3 Man. & Selw. 308.
(*c*) 8 Term Rep. 375.

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Mr. Justice PARK.—I am of opinion that in this case judgment must be entered for the plaintiff. My Brother *Wilde* has not raised the precise point, but has stated, that where there are mutual covenants in a deed, in order to make the one operate as a condition precedent, it must go to the *whole* of the consideration. There was formerly great confusion on this point; and it is difficult, if not impracticable, to deduce any certain rule or principle from the older, or even from several of the modern, authorities, in order to ascertain what covenants are independent, and what dependent. It now, however, appears to be fully understood. I shall, therefore, forbear going into all the cases, as the rule is most ably and clearly laid down by Mr. Serjeant *Williams*, in his note to *Pordage* v. *Cole*(*a*), *viz.* that "where a covenant goes only to *part* of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant; and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration." On that rule I now found my opinion. The cases to which my Brother *Wilde* has referred, militate most strongly against him. As to the facts in this case, there can be no doubt. By the terms of the contract, there was an actual assignment of the fishery in *Scotland* by the bankrupt to the defendant; and if so, this case falls within the principle established in *Boone* v. *Eyre*. There, *A.*, by deed, conveyed to *B.* the equity of redemption of a plantation in the *West Indies*, together with the stock of negroes upon it, in consideration of a certain sum, and an annuity for life; and covenanted, that he had a good title to the plantation, was lawfully possessed of the negroes, and that *B.* should quietly enjoy. And *B.* covenanted that, *A.* well and

(*a*) 1 Wms. Saund. 320 c.

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truly performing all and every thing therein contained on his part to be performed, he would pay the annuity. In an action by *A.* against *B.* on this covenant, the breach assigned was the non-payment of the annuity, and *B.* pleaded that *A.* was not, at the time, legally possessed of the negroes on the plantation, and so had not a good title to convey. But the Court of *King's Bench* held the plea to be bad on demurrer, and added, that if such a plea were allowed, any one negro not being the property of *A.* would bar the action. So here, it might be said, that, if the bankrupt had sold one barrel of fish which he covenanted not to sell, it would be a bar to the present suit. The case of *Campbell* v. *Jones* is also a most important decision on this point. There it was agreed between the plaintiff and defendant, that, in consideration of 500*l.*, the plaintiff should teach the defendant the art of bleaching materials for making paper, and permit him, during the continuance of a patent which the plaintiff had obtained for that purpose, to bleach such materials according to the specification; and the plaintiff, in consideration of the sum of 250*l.* paid, and of the further sum of 250*l.* to be paid, by the defendant to him, covenanted that he would, with all possible expedition, teach the defendant the method of bleaching such materials; and the defendant covenanted that he would, on or before a certain day, or sooner, in case the plaintiff should, before that time, have taught him the art of bleaching such materials, pay to the plaintiff the further sum of 250*l.*:—in covenant by the plaintiff against the defendant, the breach assigned was the non-payment of the 250*l.*; and there was a special demurrer, assigning for cause that it was not averred that the plaintiff had taught the defendant the method of bleaching such materials; but the Court held, that these covenants were independent covenants; that the whole consideration of the agreement being, that the plaintiff should permit the defendant to bleach materials, as

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well as teach him the method of doing it, the covenant by the plaintiff to teach, formed but *part* of the consideration, for the breach of which the defendant might recover a recompence in damages. It would be an idle waste of time to go through all the cases. In *Fothergill* v. *Walton* (*a*), the owner of a ship covenanted, by charter-party, with the freighters, to take on board six pipes of brandy at *Havre*, and proceed therewith to *Terciera*, where the master was to take on board a full and complete cargo of fruit, or other goods, as the freighters might think fit to send along-side, and dispatch her therewith to *London;* and the freighters covenanted to pay freight for the fruit at certain terms therein specified, and on the brandy at a certain rate therein also stipulated, and guarantied the ship a complete cargo of fruit home. In covenant by the owner against the freighters for not putting a full cargo of fruit on board at *Terciera*, he averred a general performance of the covenants contained in the charter-party, on his part to be fulfilled;—and it was held to be sufficient, as the covenant by the owner to take the brandy from *Havre* to *Terciera*, was an independent and distinct covenant, and not to be considered as a condition precedent; as it went only to a *part* of the consideration of the contract. Lord Chief Justice *Dallas* there delivered an excellent judgment, relying on the doctrine established by the case of *Boone* v. *Eyre*, which, he said, had been recognized by Lord *Kenyon* in *Campbell* v. *Jones*, and by Lord *Ellenborough* in *Havelock* v. *Geddes* (*b*); and I, after referring to *Boone* v. *Eyre*, quoted what fell from Mr. Justice *Le Blanc*, in commenting on that case in *Glazebrook* v. *Woodrow* (*c*), *viz.* that " the substantial part of the agreement being the conveyance of the property in respect of which the annuity was to be paid, the Court held it to be no answer to an action for the annuity, to say that the plain-

(*a*) 2 B. Moore, 630; *S. C.* 8 Taunt. 576. (*b*) 10 East, 564.
(*c*) 8 Term Rep. 375.

tiff had not a good title in some of the negroes which were upon the plantation, because all the material parts of the covenant had been performed; and the plaintiff had a remedy upon the covenant for any special damage sustained by the non-performance of the rest." In *Ritchie* v. *Atkinson* (*a*), where the agreement was, that the master should take on board a complete cargo, and proceed and deliver the same, on being paid freight at so much *per* ton,— it was held, that the delivery of a *complete* cargo was not a condition precedent to the right to freight. I am therefore of opinion, that those later decisions have established a true principle, which is conclusive against the argument raised in support of the defendant's plea.

Mr. Justice BURROUGH.—I have read the deed, as set out in the first plea, with the greatest possible attention; and it is evident that the parties did not intend that the covenant by the defendant to pay the annuity was to be dependent, so as to make the plaintiff's covenant not to interfere with the trade assigned a condition precedent. The case of *Campbell* v. *Jones* is a leading authority on this subject, where, in consideration of 250*l.* paid by *B.* to *A.*, the latter covenanted that he would, with all possible expedition, instruct the former in a certain mode of bleaching materials for making paper, and *B.* covenanted that he would, on or before a certain day, if *A.* should, before then, have instructed him, pay the further sum of 250*l.*; and it was said on the one hand that *A.'s* teaching *B.* his method of bleaching was a condition precedent to *A.'s* right to demand payment of the last sum of 250*l.*; and on the other hand it was insisted, that they were distinct and independent covenants; and so the Court held, and consequently decided, that *A.* might sue *B.* for the latter sum, without averring in his declaration that he had taught *B.* the mode of bleaching. In

(*a*) 10 East, 295.

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that case, all the former authorities, as to dependent and independent covenants, were referred to; and among them was that of *Kingston* v. *Preston* (*a*), where the distinction between mutual and independent covenants, and covenants which are conditions and dependent, was most clearly and satisfactorily laid down by Lord *Mansfield*. On the result of all the authorities, I am clearly of opinion that the covenant of the bankrupt not to interfere, is not a dependent covenant; nor can it be considered as a condition precedent to the plaintiff's right to recover in this action.

Mr. Justice GASELEE. — The doctrine as to mutual and independent covenants, and those which are dependent, is clearly laid down in *Kingston* v. *Preston*, and by Mr. Serjeant *Williams*, in his note to the case of *Pordage* v. *Cole*; and they are to be construed to be either dependent or independent of each other, according to the intention and meaning of the parties, and the good sense of each particular case. Here, the consideration for the payment of the annuity by the defendant was founded on two things: the one, the allowing him the exclusive right of carrying on one branch of the trade; and the other, the assigning to him the bankrupt's interest in the fisheries in *Scotland*; as it is recited in the deed, that *Thomas Cresswell*, the father, had proposed and agreed to relinquish and give up to the defendant that branch of the trade of the said *Thomas Cresswell*, which consisted of the receiving, and purchase, and sale, of dried and cured fish, *and also* to assign to the defendant the right, term, and interest of the said *Thomas Cresswell*, of and in the salmon fisheries in *Scotland*. There was an express assignment of the fisheries; and the parties to the deed entered into mutual covenants, *viz.* the father, not to interfere in that branch of the trade assigned to the son; and the latter, not to interfere with the other branch carried on by the father. These, therefore, were inde-

(*a*) 2 Doug. 690, n.

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pendent, and not mutual, covenants, or conditions. The case of the Duke of *St. Albans* v. *Shore*, to which we have been referred, is distinguishable from the present, and those which bear more immediately on the question;—as in that case, there were mutual covenants, which went to the *whole* consideration on both sides. There, in articles of agreement for the sale of lands, it was agreed that the seller should take, in part of payment, a conveyance of other lands belonging to the buyer; and it was also agreed, that all timber-trees, which were then upon any of the estates, should be valued by appraisers, and paid for by the respective purchasers on a given day: and to an action of debt, by the vendor against the purchaser, for the penalty, on his refusal to complete the purchase, the latter pleaded that the former, before the time, cut down a certain number of trees, and thereby rendered himself unable to perform his covenant, and that it was impossible for him to perform the agreement;—this was held to be a good plea, on the ground that the state of the premises was altered by the vendor's having cut down the timber.

Judgment for the plaintiff.

HALLETT *v.* DEWIS.

Tuesday, Nov. 20th.

THIS was an action brought by the plaintiff, as indorsee of a bill of exchange, for 450*l.*, dated the 7th *August*, 1826, drawn by one *Richard Badnall*, upon, and accepted

J. S. drew a bill on the defendant (which the latter accepted for the accommodation of the former) and indorsed it to the plaintiff as his agent, in which character the plaintiff paid it away, on account of the drawer, for wine contracted to be purchased for him. Subsequently, the wine contract being rescinded, the holder of the bill refused to give it up, until he had been paid a sum of 150*l.* which he alleged to be due to him from the drawer. The plaintiff engaged to pay it, received the bill, and sued the defendant as the acceptor:—Held, that he was not entitled to recover, although it was insisted that he had a lien on it to the amount he had promised to pay the holder on its being delivered up to him.

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by, the defendant, payable, at two months after date, to the order of the drawer, and by him indorsed to the plaintiff. The facts of the case, as they appeared at the trial, before Mr. Justice *Gaselee*, at the Sittings at *Guildhall*, after the last Term, were as follow:—

Richard Badnall, the drawer of the bill, was one of the firm of *Badnall, Spilsbury*, and *Cruso*, carrying on business at *Leek*, in *Staffordshire*. The defendant was their agent, and in that capacity had been in the habit of accepting bills, and making payments for them, to a considerable amount. Subsequently, the firm of *Badnall & Co.* having become bankrupt, the partnership was dissolved, as far as regarded *Richard Badnall*, and he, being in want of money, requested the plaintiff to raise it for him, either by way of discount, or by purchase of goods on credit. The plaintiff accordingly, as the agent of *Badnall*, applied to one *Richard Symonds*, a wine merchant, and requested him to discount the bill which forms the subject of this action, and which was accepted by the defendant for the accommodation of *Badnall*; this *Symonds* declining to do, the plaintiff then treated with him for the purchase of a quantity of wine, for which the bill was given in part payment, and indorsed, in blank, by *Badnall* to the plaintiff. A transfer order for the wine was accordingly given by *Symonds* to the plaintiff, as the agent of *Badnall*, and indorsed by *Badnall* to the defendant, for the purpose of enabling him to sell the wine, to raise money on it, for *Badnall's* use. The defendant finding, from the high prices charged for the wine, that he could not sell it, without incurring a very considerable loss, wrote to *Badnall*, who was then in *France*, stating the circumstances, and recommending him to get the wine contract rescinded, and his, the defendant's, acceptance returned. It appeared that the wine contract was accordingly rescinded, but that on application being made by the plaintiff to *Symonds* for the return of the

acceptance, he refused to give it up, until he had been paid the above sum of 150*l.*, which he alleged to be due to him from *Badnall*; and that the plaintiff thereupon promised *Symonds*, that if he *(Symonds)* would give up the bill to him, he (the plaintiff) would pay the 150*l.*; to which *Symonds* assented, and accordingly gave the bill to the plaintiff, who, on its being dishonoured by the defendant, commenced the present action against him.—In order to shew these facts, the defendant produced a letter, dated the 22d *August*, 1826, written by the plaintiff, in *London*, and addressed to *Badnall*, at *Paris*; in which the former, after stating the difficulties under which he laboured in obtaining cash to meet dishonoured bills, and others then falling due, and that he could not obtain discounts for those then in his hands, said, "it is impossible to raise any thing on the wines, and Mr. *Symonds* agrees to take them back if it be your desire, which it no doubt will be. Mr. *Dewis* wants *Symonds* to cancel the bargain, and to give him up his acceptance; but *Symonds* says, he cannot do the former without your consent, and the latter he expects to hold till he is paid the 150*l.*, which he borrowed on your acceptance for 300*l.*, which acceptance he is ready to give up, as he cannot get it discounted. *Symonds*, I believe, can get *Dewis's* acceptance discounted, but *Dewis* would be displeased if it were done; yet if you could authorize this, and the overplus to be handed to me, I could meet the *Callington* bills, and if you were sure of meeting *Dewis's* in time, he would not be injured. These regulations I must leave to you, hoping that you will not fail to send me something immediately. Whatever you remit to Mr. *Dewis*, will be kept; therefore, you must send direct to me, whatever you intend for my use. *Symonds* always shipped the best wines, and the best proof of honourable dealing is, that *Symonds* takes the wine again. He will do his utmost to assist me with a discount, but he must have paper, or he cannot act."—In another letter from the plain-

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tiff to *Badnall*, of the 25th *August*, 1826, he stated, that *Symonds* would take the wine back, if *Badnall* would write him a letter authorizing him so to do; and that he should do it immediately. That *Dewis* (the defendant) would not part with a bill or a sixpence, and that he (the plaintiff) was left in a deplorable way. In addition to the above letters, one, addressed by the plaintiff to *Badnall*, dated the 29th *September*, 1826, was offered in evidence, which was objected to by the plaintiff's counsel, as it was not shewn to be in the defendant's possession; but the learned Judge being of opinion that, as the plaintiff had previously written to *Badnall*, as to the bill being given up, and the contract for the wine rescinded, it was admissible to shew that fact; and, on its being read, the following appeared in a postscript, "Do not remit *Dewis* to provide for his acceptance, due the 10th, 450*l.*; if you do, he will not pay the bill, but will hold the money. If you remit to me or to Mr. *Bolton*, it shall be appropriated as it ought." The defendant then gave in evidence a letter, dated the 26th *September*, 1826, written by *Badnall*, at *Paris*, addressed to him, and in which he said "I have written several times to *Hallett*, and once to Mr. *Symonds*, about the wine, and yesterday got another letter from *Hallett*, saying, that *Symonds* was willing to cancel the bargain. In conformity therewith, I enclose you herewith a note to that gentleman, and I have no doubt he will do as you wish, as to the acceptance."

Under these circumstances, it was submitted, for the defendant, that, as the bill was accepted for the accommodation of *Badnall*, who had directed *Symonds* to give it up, the plaintiff could not be considered a holder for value, and more particularly so, as he acted as the agent of *Badnall*; and that there was no consideration moving between *Badnall* the drawer, and the defendant as the acceptor; nor any as between the plaintiff and *Badnall* the indorser.

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The learned Judge was of opinion, that the plaintiff had a right to hold the defendant's acceptance, until the 150*l.*, due to *Symonds* from the drawer, had been paid, as the bill was delivered up by *Symonds* to the plaintiff, on his undertaking that that sum should be paid, although he had not, in point of fact, paid it. The Jury, however, found a verdict for the defendant:—leave being reserved to the plaintiff, to move that it might be set aside, and that a verdict might be entered for him for 150*l.*, if the Court should be of opinion that, from the evidence adduced at the trial, he had proved a sufficient consideration to support his claim to that amount.

Mr. Serjeant *Spankie*, on a former day in this Term, accordingly obtained a rule *nisi*, that a verdict might be entered for the plaintiff, for the above sum, or a new trial granted, on the ground, that, as *Symonds* would not have given up the bill to the plaintiff, unless he had consented to pay 150*l.* due to the former from *Badnall*, the drawer, which the plaintiff undertook to do, and in consideration of which the bill was delivered to him, he had a right to recover that sum from the defendant as the acceptor.

Mr. Serjeant *Wilde* now shewed cause, and submitted, that, under the circumstances, there was no ground whatever to disturb the verdict found for the defendant. The plaintiff acted as agent for *Badnall*, for whose accommodation the defendant accepted the bill; and the plaintiff was aware of the whole of the transaction, and that the bill, when it arrived at maturity, was not to be provided for by the defendant, but by *Badnall*. The plaintiff also negotiated with *Symonds* to cancel the wine contract, and give up the defendant's acceptance, and he must be considered in that respect as acting as the agent of *Badnall* and *Symonds*, and although he knew that there was no con-

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sideration as between *Badnall*, the drawer, and the defendant, yet he took the bill from *Symonds*, and now sues on it as if he were the principal. The plaintiff, by his letter to *Badnall*, on the 22d *August*, shews, that he knew the bill was given to *Symonds* for wine, and explains the terms on which the latter was willing to give it up; and from the subsequent correspondence in *September*, it is evident that he acted as *Badnall's* agent for the purpose of cancelling the wine contract, and getting back the bill. Although the plaintiff agreed to pay *Symonds* 150*l.*, such agreement was not in writing, nor has he performed it; and *Symonds*, though a *bonâ fide* creditor of *Badnall* on another account, had no right to retain the bill, which came into his hands for a specific purpose, and for which it was not used. *Badnall* himself could not have been entitled to recover as against the defendant, there being no consideration moving between them; and the plaintiff, as agent, cannot be placed in a better situation than that in which his principal stood with respect to the defendant, who accepted the bill solely for the accommodation of his principal.

Mr. Serjeant *Spankie*, in support of the rule.—The plaintiff was not the general agent of *Badnall*. He merely acted as his correspondent, and had incurred liabilities on his account; and *Badnall* having been discharged from his contract with *Symonds* with respect to the wine, on an undertaking by the plaintiff, to pay the latter 150*l.*, due to him from *Badnall*, the drawer of the bill, the defendant, as the acceptor, is liable to that amount. The plaintiff was in possession of the bill when he gave it to *Symonds* for the purpose of being discounted, it having been indorsed to him by *Badnall;* and if *Symonds* had discounted it, the plaintiff would have been entitled to the proceeds, as *Badnall* was indebted to him; and there was no specific ap-

propriation of the bill by him. The plaintiff, therefore, as the indorsee, has a right to recover against the defendant, as the acceptor; nor could he be precluded from purchasing what *Symonds* had a right to dispose of; and he may be considered as a trustee for *Symonds* as to this bill. There can be no doubt, but that *Symonds* might have recovered against the defendant; if he had retained the bill in his own possession; and as the plaintiff, in point of fact, became the purchaser for 150*l.*, he is, at all events, entitled to recover that sum from the defendant; and a verdict must consequently be entered for him to that extent.

Mr. Justice PARK.—This case is so extremely confused, that it is difficult to form an accurate opinion of its merits, so as to arrive at a satisfactory conclusion. I shall, however, confine myself to one point, on which alone I think that a new trial ought not to be granted, nor a verdict entered for the plaintiff, for the sum of 150*l.*, which is the purport of his application to the Court. The circumstances, from which I arrive at the conclusion I have formed, are shortly these. The defendant accepted a bill for 450*l.* for the accommodation of *Badnall*, by whom it was drawn, and which found its way to the hands of *Symonds* for the purpose of being discounted. He, at first, refused to do so, but afterwards entered into a negotiation with *Badnall*, through the plaintiff as his agent, to take the acceptance in payment for wine; and the plaintiff knew that that contract was afterwards put an end to, he himself being a party to the negotiation. *Symonds*, however, still held this bill for 450*l.*; and the plaintiff, in his letter to *Badnall* of the 22d *August*, states that *Symonds* expected to hold the defendant's acceptance, till he was paid 150*l.*, which he borrowed on *Badnall's* acceptance for 300*l.*; and which acceptance he *(Symonds)* said he was ready to give up, as he could not get it discounted. It then appears

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that the bill in question was delivered up to the plaintiff, on his undertaking to pay the above sum of 150*l.* This, too, the plaintiff did of his own accord, although the contract, as to the wine, was put an end to. I am of opinion that *Symonds* had no right to make this stipulation, nor could he maintain an action against the defendant as the acceptor, as he had created new terms by his own act, without the sanction or knowledge of *Badnall*, the drawer; and as the bill came into the hands of *Symonds* for a specific purpose, *viz.* on the contract for the sale of the wine, he had no right to pay it over to the plaintiff on his agreeing to pay him the 150*l.* then due to him from *Badnall;* nor had he any right to create a lien on the property of another, *viz.* the acceptance of the defendant, which was left with him in the first instance for a specific purpose, which has not been satisfied. I am, therefore, of opinion that there is no ground for this application.

Mr. Justice BURROUGH.—The bill was, in the first instance, accepted by the defendant for the accommodation of *Badnall.* There was no valid consideration moving between them to make the former liable to the latter; and *Symonds* had no right to require payment, from the plaintiff, of the sum of 150*l.*, due to him from *Badnall* on another account.

Mr. Justice GASELEE.—As my two learned Brothers are of opinion that *Symonds* had no right to impose on the plaintiff the terms of paying the sum of 150*l.*, or to sue the defendant as the acceptor of the bill, there is an end of the question. However, I am not fully prepared to come to that conclusion. I should have preferred a further enquiry, in order to ascertain for what purpose, and from what motive, the defendant became a party to the con-

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tract for the wine; as well as the actual situation in which the plaintiff stood, with regard to *Badnall*. If the former were only the agent of the latter, he could not, by entering into a contract with *Symonds*, make the defendant his debtor. But as the Court are clear on the other point, and as I am not prepared to say that they are not warranted in coming to the conclusion they have, this rule must be—

Discharged.

GAINS *v.* BILSON.

Wednesday, Nov. 21st.

If a cause be made a *remanet* at the Assizes, a new notice of trial is necessary, if the plaintiff intend to try the cause at the following Assizes. Therefore, where notice of trial for the *Spring* Assizes had been given, and the cause made a *remanet* to the next *Summer* Assizes; and the defendant having then attended with his witnesses, and found that the cause was not set down, afterwards applied for costs to be paid by the plaintiff for not proceeding to trial:—Held, that he was not entitled.

ON an affidavit, by the defendant's attorney, that notice of trial had been given in this cause for the last Spring Assizes at *Leicester*, and that it had then been made a *remanet* to the Summer Assizes following; and that the attorney, not having received notice of countermand, had issued *subpœna's* for the attendance of witnesses at such Summer Assizes; but that the cause not having been entered by the marshal on the second day after the commission-day, the plaintiff's attorney informed the defendant's attorney that it would not be tried at those Assizes, as he had not given notice—

Mr. Serjeant *Adams*, on a former day in this Term, obtained a rule, calling on the plaintiff to shew cause why he should not pay the defendant his costs, to be taxed by one of the Prothonotaries, for not proceeding to trial at the Summer Assizes.

Mr. Serjeant *Taddy* now shewed cause, on an affidavit of the plaintiff's attorney, which stated, that, shortly after the last Spring Assizes at *Leicester*, he informed the defendant's attorney, that he did not intend to try the cause until the Spring Assizes, for that county, in 1828,

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and that he met him in the street at *Leicester*, and repeated such information to him, shortly before the commission-day at the last Summer Assizes.

The Court observed, that there was no ground whatever for the application; as, if a cause be made a *remanet* at the Assizes, a written notice of trial is necessary, in case the plaintiff intend to try the cause at the following Assizes, as the same Judge does not go the same circuit, and the Marshal does not retain the records in his custody; and they said, that there was a distinction as to causes tried at the Sittings in *London* or *Middlesex*, in which case they are entered with the same Marshals. Besides, here, the plaintiff's attorney has expressly sworn, that he told the attorney for the defendant that he did not intend to proceed to trial at the last Summer Assizes. This rule, therefore, must be—

Discharged with costs.

Wednesday, Nov. 21st.

ELVIN and Another *v.* DRUMMOND.

The plaintiffs having been nonsuited, obtained a rule for a new trial, which was silent as to costs. The defendant, without going again to trial, gave the plaintiffs a *cognovit* to confess judgment, "and that the plaintiffs had sustained damages to the amount of one shilling, besides the costs to be taxed by the Prothonotary, and he should think the plaintiffs entitled." The Prothonotary having refused to tax the plaintiffs the costs of the nonsuit,—the Court would not interfere, saying, that, as the parties, by the terms of the *cognovit*, had agreed to constitute the Prothonotary their arbitrator, they must be bound by his decision.

THIS was an action against the defendant, as Sheriff of *Surrey*, for an escape and false return to a writ of *capias ad satisfaciendum*. At the trial, before Mr. Serjeant *Onslow*, at the last Spring Assizes for the county of *Surrey*, an objection was taken, by the defendant's counsel, to the writ, it being entitled *George* 3rd. instead of *George* 4th; and the learned Serjeant considering the objection to be well founded, directed a nonsuit. A rule *nisi* was obtained in the last *Easter* Term to set it aside, and that a new trial might be granted, which rule was in the last Term made absolute, but was silent as to the costs of the non-

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suit, and the motion for the new trial. The plaintiffs being prepared to try the cause again at the last Assizes at *Croydon*, the defendant's attorney gave the plaintiffs' agent a *cognovit* in the following form, *viz.* " I hereby confess this action, and that the plaintiffs have sustained damages to the amount of one shilling, besides their costs to be taxed by the Prothonotary, and he shall think the plaintiffs entitled."

The Prothonotary having refused to tax the plaintiffs' costs of the nonsuit, considering it to be a fit question for the opinion of the Court—

Mr. Serjeant *Cross*, on an affidavit of the above facts, now applied to the Court to direct such costs to be taxed; and he relied on the case of *Booth* v. *Atherton* (*a*), where, after argument on a special case, the Court directed a new trial, the cause being insufficiently stated; and the defendant, without going to trial again, gave the plaintiff a *cognovit;* the Court held, that the defendant was liable to pay the costs of the former trial: and on *Jackson* v. *Hallam* (*b*), where, the plaintiff having obtained a verdict, the Court, on the application of the defendant, granted a new trial, on the ground that the Judge had misdirected the Jury in point of law; but the rule for the new trial was silent as to costs; and the defendant, without going to trial, gave the plaintiff a *cognovit;* the Court held, that the defendant was liable to pay the costs of the trial. That case is precisely in point, as here the rule for the new trial having been made absolute, the defendant afterwards settled the action by giving a *cognovit*, whereby he admitted that the plaintiffs had a good cause of action. In *Tidd's Practice* it is stated (*c*), that when the rule is silent as to costs, the costs of the first trial are not in general allowed in the *King's*

(*a*) 6 Term Rep. 144. (*b*) 2 Barn. & Ald. 317.
(*c*) Vol. 2, 7th Edit. 922.

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Bench, which ever way the verdict may go upon the second trial; but that, in this Court, the rule is different; as here, if a new trial be granted, and the rule say nothing about costs, if the verdict on the second trial go the same way, the party succeeding is entitled to the costs of both trials. And if the plaintiffs in this case had succeeded on the second trial, it is quite clear that they would have been entitled to the costs both of the nonsuit and of the motion to set it aside.

[Mr. Prothonotary *Watlington* stated, that when the parties came before him, affidavits were produced on both sides as to the costs of the nonsuit. That he considered this case to be altogether distinguishable from that of *Jackson* v. *Hallam*, as here the plaintiffs were nonsuited, and there the plaintiff obtained a verdict; and that on reading the plaintiffs' affidavits, he thought they were not entitled to the costs of the nonsuit.]

Mr. Justice PARK.—The parties constituted the Prothonotary their arbitrator; and his decision must be deemed final: and although in point of justice the plaintiffs might be entitled to the costs of the nonsuit, yet they must be bound by the terms of the *cognovit*, by which they consented that the costs to which they might be entitled, were to be allowed according to the discretion of the Prothonotary. He acted on affidavits made by both parties; and it would be too much for us to say, that he has not exercised a sound discretion.

Mr. Justice BURROUGH and Mr. Justice GASELEE concurring—

Rule refused.

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FREEMAN, Gent., One &c., *v.* BURGESS.

Thursday, Nov. 22d.

A RULE was obtained by Mr. Serjeant *Cross* on a former day in this Term, calling on the plaintiff to shew cause why the defendant should not be discharged out of the custody of the Sheriff of *Middlesex*, on his entering a common appearance; on affidavits, which stated that the defendant was arrested by the Sheriff of *Middlesex*, at the suit of the plaintiff, for 80*l.*, under and by virtue of an attachment of privilege. That on the 4th *May*, 1826, the defendant was discharged under the Insolvent Debtors' Act. That he had had no dealing or transaction whatever with the plaintiff since his discharge. That, in *March*, 1825, the plaintiff became the surety or guarantee for the defendant, for the payment of an annuity for the life of the defendant, granted to one *Robert Stewart*, of &c., and secured by covenants of the plaintiff and defendant, and also by a judgment entered up against them; and that the present cause of action arose from the plaintiff's having paid the sum of 80*l.* for arrears of the said annuity, which had become due since the defendant's discharge. That the state of the transactions between the defendant and plaintiff was entered in the defendant's schedule of debts, upon his discharge under the Insolvent Act, in the words and figures, or to the effect following (that is to say)—"No. 17, *Robert Stewart*, of &c., 565*l.* He advanced 500*l.* to me (the insolvent) on the annuity-bond, for 65*l. per annum*, in which Mr. *Andrew Freeman*, No. 3 & 18 in my schedule, joined. The 65*l.* insert for interest. No. 18, Mr. *Andrew Freeman*, of &c. Atty. Dr. No. 3, 565*l.* I schedule him for this amount, he having joined me in an annuity-bond, as stated No. 17. He is also the holder of several bills of exchange, all of which I have satisfied, but they remain in his hands;

The grantor of an annuity, discharged under the Insolvent Debtor's Act, 1 *Geo.* 4, c. 119, is liable to be *arrested* by his surety for arrears which became due subsequently to his discharge, and which the surety was obliged to pay. Where, therefore, a defendant had been *arrested* under such circumstances, the Court refused to discharge him out of custody, on a motion to enter a common appearance, but left him to defend the action; although the surety had received a dividend, and the grantee had proved the value of the annuity, which was ascertained by the Commissioners in pursuance of the 10th section of the statute.

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the amount and particulars I am unable to state. He also holds a policy of insurance, on my life, for 200*l.*, which I have assigned to him as a security for 163*l.*, previous to his entering into the said annuity-bond; and at the time of my receiving the 500*l.*, I paid him the 163*l.*, but he omitted to give up the policy of insurance, and now refuses so to do." That the defendant caused due notice to be given to the plaintiff, of his intention to avail himself of the Insolvent Debtors' Act, according to the directions of the act. That the plaintiff appeared in the Insolvent Court, by counsel, and ineffectually opposed the defendant's discharge, on the ground that the whole of a yearly salary, and yearly emoluments, which the defendant was in receipt of, should be given up to his creditors, which the Insolvent Court thought unreasonable. That a further entry was made in the defendant's schedule, as follows:—" No. 3, *Andrew Freeman* (detaining creditor) *22l.* and upwards, and costs. He joined me in an annuity-bond, for *65l. per year*, to *R. Stewart*, No. 17, in my schedule, and, in *November* last, I believe he paid *22l.* to the said Mr. *Stewart*, on account of the said annuity." That the plaintiff claimed, from the assignee of the defendant's estate, under the Insolvent Act, a dividend, as well upon the said sum of 565*l.*, as upon the said sum of *22l.*, and received a dividend upon the *22l.* only, and that *Stewart*, as the grantee of the annuity, was, on application to the Commissioners of the Insolvent Court, allowed to prove his debt at the sum of 497*l.*

Mr. Serjeant *Wilde* now shewed cause, on an affidavit of the plaintiff, which stated, that he did not instruct counsel to oppose the discharge of the defendant under the Insolvent Debtors' Act, but to require his (the plaintiff's) name to be struck out of the defendant's schedule, as being his creditor for 565*l.*, he (the plaintiff) being of opinion that he was only a creditor, at the time of the defendant's discharge, for about

221., a balance due to the plaintiff on the first half year's payment of the annuity mentioned in the defendant's affidavit. That he was employed by a creditor of the defendant to instruct counsel to get a part only of his (the defendant's) salary and emoluments as a surveyor of taxes, set apart towards payment of his creditors; that he had not received any dividend under the estate of the defendant, and that he held a policy of insurance upon the life of the defendant, the annual premium of which he had paid, but which he was ready to deliver up on being indemnified from the payment of the annuity. Under these circumstances, the learned Serjeant submitted, that the only question was, whether or not the defendant were entitled to be relieved by a summary application to the Court, on the ground of his having been discharged under the Insolvent Debtors' Act, 1 *Geo.* 4, c. 119; or, whether or not by such discharge his person were protected against the plaintiff's demand for the arrears of the annuity granted by the Insolvent to *Stewart*, which became due subsequently to the defendant's discharge, and which were paid by the plaintiff as his surety. As the defendant was discharged on the 4th *May*, 1826, the statute 7 *Geo.* 4, c. 57, cannot apply, that statute not having passed until the 26th of that month. It may be laid down as a general principle, that a person discharged under an Insolvent Act, is liable to his surety for payments made by him for the arrears of an annuity accruing due after his discharge; and in this case, the question, as to the defendant's liability to be *arrested* at the suit of the plaintiff, will depend on the terms of the statute, 1 *Geo.* 4, c. 119, s. 10 (*a*), which is of the same import as the 16th section of 51 *Geo.* 3,

(*a*) By which it is enacted, "that all and every creditor and creditors of any prisoner, for any sum and sums of money payable by way of annuity, or otherwise, at any future time or times, by virtue of any bond, covenant, or other securities, of any nature

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c. 125, with the exception, that by the 1 *Geo.* 4, the amount upon which the dividend of the prisoner's estate shall be calculated, and the terms and conditions on which the same shall be received, shall be first settled by the Commissioners of the Insolvent Court. Both these sections apply to annuity-creditors only; and here the defendant has been arrested at the suit of his surety. In *Page* v. *Bussell* (*a*), it was decided, that a person discharged under the statute 51 *Geo.* 3, c. 125, was liable to his surety, for the arrears of an annuity due since his discharge, which the surety had been obliged to pay; and the 16th section of the act was there referred to, as well as the statute 49 *Geo.* 3, c. 121, s. 17, from which it was insisted, that the debtor, under the 51 *Geo.* 3, was placed *in pari loco* with a bankrupt, under the 49 *Geo.* 3, c. 121, and, therefore, that it followed, that he, as well as the bankrupt, should be discharged of all demands in respect of the annuity, and that the surety could no more resort to him for repayment of the arrears, than he could have done if he had been a bankrupt; but Mr. Justice *Le Blanc* said, "the 51 *Geo.* 3 says, that the annuity-creditor shall be entitled to be admitted a creditor, but it does not say that the debtor shall be discharged in the same man-

whatsoever, may be and shall be entitled to be admitted a creditor or creditors, and shall be entitled to receive a dividend or dividends of the estate of such prisoner, in such manner, and upon such terms and conditions as such creditor or creditors would have been entitled unto by the laws now in force, if such prisoner had become bankrupt; the amount upon which such dividend shall be calculated, and the terms and conditions on which the same shall be received, being first settled by the said Court; and without prejudice in future to their respective securities, otherwise than as the same would have been affected by a proof made in respect thereof, by a creditor, under a commission of bankrupt, and a certificate obtained by the bankrupt under such commission."

(*a*) 2 Mau. & Selw. 551.

ner as if he had been a bankrupt;" and Mr. Justice *Bayley* said, "even in the case of a bankrupt, if the annuity-creditor do not come in and prove, but, disregarding the bankruptcy, sue the surety, the surety cannot insist on the certificate; and, if he cannot, may not the surety afterwards resort to the bankrupt? The present is a debt, accrued since the debtor's discharge, and therefore the plaintiff is entitled to judgment." In the subsequent case of *Flanagan* v. *Watkins* (*a*), it was decided, that a surety under an annuity-deed, who had redeemed the annuity subsequently to the bankruptcy and certificate of the grantor, might maintain an action of debt against him, on an indemnity-bond, for the sum paid by such surety for the value of the annuity, on its redemption, although the grantee had proved for the arrears and value of the annuity, under the statute 49 *Geo.* 3, c. 121, s. 17: and the judgment of the Court of *King's Bench*, in that case, was affirmed in the *Exchequer Chamber*, in error (*b*). No distinction can be drawn between redemption and payment; for, in *Welsh* v. *Welsh* (*c*), it was held, that a surety in an annuity-deed, who was compelled by the annuity creditor, after the bankruptcy, and allowance of the certificate, of the principal, to pay several sums for arrears due after the issuing of the commission, was not within the statute 49 *Geo.* 3, c. 121, s. 8, and, therefore, that he might have an action against the principal for such sums, *and hold him to bail.* In that case the application was similar to the present, and the only distinction is, that there the party seeking to be discharged, had become bankrupt, and Lord *Ellenborough* said, "the surety cannot compel the annuity-creditor to come in and prove, and

(*a*) 3 Barn. & Ald. 186; *S. C.* (in error); 8 B. Moore, 480; 1 Bing. 413.

(*b*) See 8 B. Moore, 504.

(*c*) 4 Mau. & Selw. 333.

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it is not a debt *quoad* the surety until he is in a condition to be damnified by it. If the Legislature intended such a case as this, they have not so said, nor have they used language sufficiently clear to enable us so to say;" and Mr. Justice *Le Blanc* added, " by section 17, the annuity-creditor, whether there shall or shall not be arrears due, may prove for the value of the annuity;" and here the only acts in force, at the time of the defendant's discharge, were the 49 *Geo.* 3, and 1 *Geo.* 4.

Mr. Serjeant *Cross*, in support of his rule.—The case of *Page* v. *Bussell* is altogether distinguishable from the present, as there the annuity-creditor could not come in and prove, as in a case of bankruptcy, and the surety was compelled to pay, under the express terms of the Insolvent Act. The same reason applies to *Welsh* v. *Welsh*, for in that case the annuity-creditor had not proved the debt under the commission. The only decision, therefore, which militates against the present application, is that of *Flanagan* v. *Watkins*, where the grantee had proved, under the commission, for the arrears and value of the annuity. There, however, the grantor had become bankrupt, and had given a bond to his surety, conditioned to indemnify him from the payment of the annuity; on which collateral security the action was founded; and the question there was, not whether an action could be maintained against the bankrupt, but whether or not he should be discharged from custody. Here, however, there was no indemnity-bond; and although the defendant may be liable to the plaintiff, yet his person is privileged from *arrest*. If an annuity-creditor come in and prove his debt, and obtain for it 10*s*. in the pound, he cannot afterwards proceed against the surety for the whole value of the annuity. Again, the grantor's estate may be sufficient to pay 15*s*. in the pound, to the grantee,

and if so, the latter cannot claim the whole of the annuity from the surety. If he could, he would in fact be paid twice. The defendant has satisfied the price of the annuity, as valued by the commissioners, and the plaintiff has received a dividend, and yet the defendant is now called on as if he had paid nothing. Here, the question will not depend on the construction of the 8th and 17th sections of the statute 49 *Geo.* 3, as to proof of the value of the annuity, or whether the plaintiff, as surety for the defendant, be or be not entitled to recover the sum for which the present action is brought, but whether or not he were justified in *arresting* the defendant, and causing him to be detained in custody. The express object of the statute, 1 *Geo.* 4, was to protect the person of an insolvent after his discharge. By the 25th section, it is enacted, that when any order for the discharge of a prisoner shall be made, the commissioners of the Insolvent Court may order a judgment to be entered up against him, in one of the superior courts, in the name of the provisional, or subsequent assignees, for the amount of the debts of the prisoner, which shall, at the time of the order, remain due and unpaid to the creditors, and from which such prisoner shall be discharged by such order; and that the prisoner shall execute a warrant of attorney, to authorize the entering up such judgment; and the commissioners may permit execution to be taken out thereon, when there are assets, and the prisoner is of ability to pay. Here, the grantee has proved a debt of 497*l.*, the amount of the annuity, as valued by the commissioners, and the judgment has been accordingly entered up for that sum, and the grantee may, on application to the commissioners, and on shewing that the defendant has effects, or is able to pay, have an execution sued out upon that judgment; and the surety, by redeeming the annuity or paying the amount proved, might stand in the place of the annuity-creditor, and take out execution accordingly. In *Flanagan* v. *Watkins*, the plain-

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tiff sued on a collateral bond. Here the defendant only seeks to be discharged from his arrest, and by the 26th section of the statute 1 *Geo.* 4, it is provided that a prisoner, after judgment is entered up, is not to be subject to imprisonment by reason of the same, and that if he be arrested upon it, he may be discharged by the order of a Judge of the Court from which the process issued. As, therefore, the grantee has claimed for the value of the annuity on which judgment has been entered up, and the plaintiff has actually received a dividend, he cannot be entitled to detain the defendant in custody, nor ought he to have arrested him in the first instance.

Mr. Justice PARK.—This is an application to discharge the defendant out of the custody of the Sheriff, on his entering a common appearance. It has not been denied, that he is liable to an action at the suit of the plaintiff. Indeed, all the cases to which we have been referred, clearly shew that he is. It has been insisted that it is a great hardship to keep him in custody, and that, as he ought not to have been arrested, he is, under the circumstances, entitled to be discharged on motion; but he may bring the matter before the Court in another and a better shape; and with respect to the hardship the defendant may sustain, by being kept in confinement, that is an argument that may apply to many other cases: for instance, to a case of coverture, where the Court will sometimes interfere, on motion, as if it be shewn that the plaintiff knew that he had been treating with a married woman; but in general they will leave her to plead her coverture. Besides, we are not to be influenced by a mere hardship cast on a particular party; and I am clearly of opinion, that in this case the defendant is not entitled to his discharge. If he have a good ground of defence, he may put it on the record. All the cases, from that of *Page* v. *Bussell*, which was decided in 1814, establish the principle, that an insolvent debtor after his discharge,

or a bankrupt who has obtained his certificate, is liable to his surety, for the arrears of an annuity due since the discharge of the one, or the issuing of the commission against the other; and that principle was sanctioned in *Flanagan* v. *Watkins*, by the Court of *King's Bench*, who were unanimously of opinion, that a surety under an annuity-deed, having redeemed the annuity subsequently to the bankruptcy of the grantor, might maintain an action for the value, against the bankrupt, who had obtained his certificate, and that although the grantee had proved under the commission in pursuance of the 17th section of the statute 49 *Geo.* 3, c. 121; and that judgment was afterwards affirmed in the Court of *Exchequer Chamber*, after a full and able argument; and there can be no question but that that decision is right. It has been said, that that case differs from the present, as there the action was brought on an indemnity-bond. It is, however, an express authority to shew, that the defendant is liable to an action at the suit of the plaintiff, and if so he is not entitled to be relieved on this application. In *Touissant* v. *Martinnant* (*a*), it was held, that if a surety, bound with his principal for payment of money by instalments, take, from the principal, a bond conditioned for payment of the amount of the instalments before the first of them will be due, and before that time the principal become bankrupt and obtain his certificate, and afterwards the instalment bond be discharged by the surety, he cannot maintain an action of *assumpsit* against the principal, as for money paid to his use, on the ground, that, where a surety will not rely on the promise which the law will raise, but takes a bond as a security, he has chosen his own remedy, and therefore cannot resort to an action of *assumpsit*. Here, however, it has been contended, that the defendant was not liable to be *arrested* at the suit of the plaintiff; but in *Welsh* v. *Welsh*, where the surety, in

(*a*) 2 Term Rep. 100.

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an annuity-deed, was compelled by the annuity-creditor, after the bankruptcy and allowance of the certificate of the principal, to pay several sums for arrears due after the issuing of the commission, it was held, that he was not within the statute 49 *Geo.* 3, c. 121, and therefore that he might have an action against his principal for such sums, *and hold him to bail.* That is this very case; and Lord *Ellenborough* there said, "The surety cannot compel the annuity creditor to come in and prove; and it is not a debt *quoad* the surety until he is in a condition to be damnified by it." Although the statute 49 *Geo.* 3 contains no provision for this particular case, yet the late act, 6 *Geo.* 4, c. 16, is expressly applicable to it; for by the 55th section it is enacted, "that it shall not be lawful for any person entitled to any annuity granted by any bankrupt, to sue any person who may be collateral surety for the payment of such annuity, until such annuitant shall have proved under the commission against such bankrupt for the value of such annuity, and for the payment thereof; and that if such surety, after such proof, pay the amount proved as aforesaid, he shall be thereby discharged from all claims in respect of such annuity; and if such surety shall not (before any payment of the said annuity, subsequent to the bankruptcy, shall have become due,) pay the sum so proved as aforesaid, he may be sued for the accruing payments of such annuity, until such annuitant shall have been paid or satisfied the amount so paid, with interest thereon, at the rate of 4*l. per cent. per annum*, from the time of notice of such proof, and of the amount thereof, being given to such surety; and after such payment or satisfaction, such surety shall stand in the place of such annuitant, in respect of such proof as aforesaid, to the amount so paid or satisfied as aforesaid by such surety." That is a true exposition of the intention of the Legislature at the time the statute 49 *Geo.* 3 was passed. I am therefore of opinion that there is no colour for this

application, and, consequently, that the rule must be discharged.

Mr. Justice BURROUGH.—It is not necessary for us to decide, on this motion, whether or not the action were well brought. But all difficulty on that point appears to me to be removed by the 55th section of the 6 *Geo.* 4, c. 16. Still, however, should any doubt remain, the defendant is not entitled to be discharged out of custody, without procuring bail, to which the plaintiff is clearly entitled. We therefore are not bound to interfere, or relieve the defendant on this summary application, as he has his remedy by pleading to the action.

Mr. Justice GASELEE.—It does not appear that the grantee of the annuity has availed himself of the judgment and warrant of attorney. The plaintiff, as surety, cannot cause execution to be sued out on the judgment, until he has paid the value of the annuity as fixed by the commissioners; and even if it should be ascertained that the defendant has effects, or is of ability to satisfy the execution when taken out, the property of an insolvent, acquired after his discharge, and the sum raised thereon, is to be distributed rateably amongst all his creditors. This rule therefore must be—

Discharged.

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Friday, Nov 23d.

ROWLES, Demandant; LUSTY, Tenant.

[E. T. 8 G. 4. Roll 194.]

In a writ of entry *sur abatement*, in the *cui* and *per*, the demandant, by his count, demanded *six* messuages, *six* mills, *two* barns, *two* stables, *six* outhouses, *six* yards, *two* gardens, *two* orchards, *one hundred* acres of arable land, *one hundred* acres of meadow land, *one hundred* acres of pasture land, *one hundred* acres of woodland, *one hundred* acres of underwood, *one hundred* acres of land covered with water, and *one hundred* other acres of other lands, with the appurtenances, situate and being in the parish of *Stonehouse*, in the county of *Gloucester*, which the demandant claimed to be his right and inheritance, and into which the tenant had not entry, but by *Richard Dennison Cumberland* and *Susannah* his wife, to which said *Susannah*, *Robert Timbrell* devised the same, and which said *Robert Timbrell* unjustly abated

THIS was a writ of entry *sur abatement*, in the *cui* and *per*. The demandant, in his count, demanded against the tenant, *six* messuages, *six* mills, *two* barns, *two* stables, *six* outhouses, *six* yards, *two* gardens, *two* orchards, *one hundred* acres of arable land, *one hundred* acres of meadow land, *one hundred* acres of pasture land, *one hundred* acres of woodland, *one hundred* acres of underwood, *one hundred* acres of land covered with water, and *one hundred* other acres of other lands, with the appurtenances, situate and being in the parish of *Stonehouse*, in the county of *Gloucester*, which the demandant claimed to be his right and inheritance, and into which the tenant had not entry, but by *Richard Dennison Cumberland* and *Susannah* his wife, to which said *Susannah*, *Robert Timbrell* devised the same, and which said *Robert Timbrell* unjustly abated

the appurtenances; and stated his title, as cousin and heir of one *R. S.*, upon whose death one *R. T.* abated, and devised the estate to *R. D. C.*, and *S.*, his wife, by whom the tenant had entry. The tenant, as to *the said messuages*, mills, barns, stables, outhouses, gardens, orchards, and *thirty* acres of land, *thirty* acres of meadow, and *thirty* acres of pasture, with the appurtenances, *parcel of the said land in the said count mentioned*," said, "that the demandant ought not to have his seisin of the messuages or tenements, with the land and appurtenances, in the said count mentioned, *or any part thereof*," and pleaded, that *R. S.*, being seised of the messuages, &c., devised the same to *R. T.* in fee; that *R. T.* became seised of the messuages, and afterwards devised them to *S.*, the wife of *R. D. C.*, and her heirs, for ever; that *R. D. C.* and *S.* his wife, in right of the said *S.*, thereby became seised in fee, and afterwards levied a fine, to the tenant, with proclamations, "of all the said tenements in the introductory part of the plea mentioned, and the land whereon the said buildings now stand, *by the description of four messuages, one cloth mill, four barns, four stables, one wharf, four curtilages, four gardens, four orchards, thirty acres of land, thirty acres of meadow, and thirty acres of pasture, with the appurtenances*," as by the said fine and proclamations made thereon, *now remaining of record*, in the Court of the *Bench* here, more fully appears." The tenant then averred, that, after the levying of the fine, he entered into the messuages, &c., and concluded his plea, by praying judgment, "if the demandant ought to have his seisin *of and in the messuages or tenements*, with the land and appurtenances *in the said count mentioned*." To this plea, the demandant demurred specially, assigning for causes: *first*, that, the plea was double, for alleging the *devise* by *R. S.* to *R. T.*, and by *R. T.*, to *S.*, the wife of *R. D. C.*, and also the *fine* levied by *R. D. C.* and *S.* his wife, to the tenant, either being a sufficient answer;—*secondly*, that though the plea began by selecting *part* only of the premises mentioned in the count, it averred that the demandant ought not to have seisin *of the messuages, &c. or any part thereof*, and concluded by praying judgment of *all*;—*thirdly*, that the *fine*, as pleaded, appeared not to have been levied of *all* the tenements in the introductory part of the plea mentioned, and as to which the plea was pleaded;—and, *lastly*, that the plea did not verify the fine, *by the record thereof*, but concluded with a general verification and prayer of judgment; the tenant thereby attempting to put in issue matter of record, and make it triable *per pais*:—Held, that the plea was good.

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ROWLES, Demandant; LUSTY, Tenant.

into the said tenements, with the appurtenances, after the death of *Robert Sandford*, deceased, whose cousin and heir the demandant was, within *fifty* years then last past, &c. And thereupon the demandant said, that the said *Robert Sandford*, now deceased, was, in his lifetime, and at the time of his death, seised of and in the said messuages or tenements, with the land and appurtenances, in his demesne, as of fee and right, in the time of peace, in the time of the late Lord *George* the *Third*, &c. within *fifty* years then last past, by taking the esplees thereof, to the value, &c., and from the said *Robert Sandford*, because he died without issue, the right to the said messuages or tenements, with the land and appurtenances, descended to *Charles Sandford Rowles*, now deceased, the brother of the demandant, as cousin and heir of the said *Robert Sandford*, deceased, (that is to say) as son and heir of *Elinor* (otherwise *Eleanor*) *Rowles*, deceased, who was daughter and heiress of *John Sandford Rowles*, who was son and heir of *William Sandford*, deceased, who was brother and heir of one other *John Sandford*, deceased, who was brother and heir of *Anselm Sandford*, deceased, who was son and heir of one other *Anselm Sandford*, deceased, who was a younger son of one other *John Sandford*, deceased, the great-grandfather of the said *Robert Sandford*, deceased, (the elder sons of the said last-mentioned *John Sandford* being respectively dead, and there being no issue of any or either of such last-mentioned sons living at the time of the death of the said *Robert Sandford*), and from the said *Charles Sandford Rowles*, because he died without issue, the right to the said messuages or tenements, with the land and appurtenances, descended to the demandant, as cousin and heir of the said *Robert Sandford*, deceased, that is to say, as brother and heir of the said *Charles Sandford Rowles*, deceased, who was cousin and heir of the said *Robert Sandford*, deceased, as aforesaid, and into which the tenant had not entry, but by the said *Richard Dennison Cumberland*, and *Susannah* his wife,

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to which said *Susannah*, the said *Robert Timbrell* devised the same; and which said *Robert Timbrell* unjustly abated into the said messuages, or tenements, with the land and appurtenances, after the death of the said *Robert Sandford*, &c., and that such was his right, the demandant offered, &c., and therefore he brought his suit, &c.

To this count the tenant pleaded, *First*, that the demandant was not cousin and heir of *Robert Sandford;* on which issue was joined.

Secondly, that *Robert Timbrell* did not abate into the said messuages, &c., after the death of the said *Robert Sandford;* on which issue was also joined.

Lastly, "as to *the said* messuages, mills, barns, stables, out-houses, gardens, orchards, and *thirty* acres of land, *thirty* acres of meadow land, and *thirty* acres of pasture, with the appurtenances, *parcel of the said land in the said count mentioned*, the tenant, by leave, &c. saith, that the demandant ought not to have his seisin *of the messuages or tenements*, with the land and appurtenances, in the said count mentioned, *or any part thereof*, because he saith, that, although true it is that the said *Robert Sandford*, now deceased, was, in his life time, and at the time of his death, seised of and in the said messuages or tenements, with the land and appurtenances, *in the introductory part* of this plea mentioned, in his demesne, as of fee and right, in the time of peace, in the time of the Lord *George* the *Third*, &c., within *fifty* years now last past, by taking the esplees thereof, to the value, &c.:—Nevertheless, for plea in this behalf, the tenant saith, the said *Robert Sandford*, being so seised of and in the same messuages or tenements, with the land and appurtenances, as aforesaid, in his life-time, to wit, on the 12th *March*, 1804, to wit, at &c. aforesaid, duly made and published his last will and testament in writing, and thereby (amongst other things) gave and devised the messuages or tenements, with the land and appurtenances, last aforesaid, unto, and to the use of, the said

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Robert Timbrell, his heirs and assigns for ever. And the tenant further in fact saith, that the said *Robert Sandford* afterwards, to wit, on the 1st *April*, 1804, to wit, at &c. aforesaid, died, so seised as aforesaid, without altering, revoking, or annulling his said last will and testament, leaving the said *Robert Timbrell* him surviving: whereupon, and by virtue of the said devise, he, the said *Robert Timbrell*, then and there became seised, in his demesne, as of fee and right, of and in the messuages or tenements, with the land and appurtenances, last aforesaid, in the time of peace, in the time of the Lord *George* the *Third*, &c., within *fifty* years now last past, by taking the esplees thereof, to the value &c., to wit, at &c., aforesaid; and the said *Robert Timbrell*, being so seised of and in the same messuages or tenements, with the land and appurtenances thereof, as aforesaid, afterwards, to wit, on the 16th *April*, 1804, aforesaid, at &c. aforesaid, duly made and published his last will and testament in writing, and thereby then and there gave, devised, and bequeathed, unto his sister *Susannah Cumberland* (she the said *Susannah* then and there being the wife of *Richard Dennison Cumberland*, clerk) and her heirs for ever, among other devises and bequests, the same messuages or tenements, with the land and appurtenances aforesaid; and the said *Robert Timbrell*, afterwards, to wit, on the 1st *February*, 1811, at &c. aforesaid, died, so seised of and in the same messuages or tenements, with the land and appurtenances, as aforesaid, without revoking, altering, or annulling, his said last will and testament, leaving the said *Susannah* (so then and there being the wife of the said *Richard Dennison Cumberland)* him, the said *Robert Timbrell* surviving, to wit, at &c. aforesaid: whereupon, and by virtue of which said last-mentioned devise, the said *Richard Dennison Cumberland*, and *Susannah* his wife, then and there, in right of the said *Susannah*, became and were seised of and in the same messuages or tenements, with the land and appurtenances, in their demesne as of fee and right,

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in the time of peace, in the time of the said Lord *George* the *Third*, &c. within *fifty* years now last past, by taking the esplees thereof, to the value, &c. to wit, at &c. aforesaid. And the tenant further saith, that the said *Richard Dennison Cumberland*, and *Susannah* his wife, being so seised of and in the same messuages or tenements, with the land and appurtenances, as aforesaid, in right of the said *Susannah*, as aforesaid, afterwards, to wit, in *Trinity* Term, in the 51st year of the reign of our late sovereign Lord *George* the *Third*, a certain fine was duly had and levied in his Majesty's Court of the *Bench* here, before &c., then his Majesty's Justices of the *Bench* aforesaid, and other faithful subjects of our said Lord the King then there present, between the tenant, by the name of *Saul Lusty*, complainant, and the said *Richard Dennison Cumberland*, and *Susannah* his wife, by the names of *Richard Dennison Cumberland*, clerk, and *Susannah* his wife, deforciants, (amongst other things), of all the said tenements in the introductory part of this plea mentioned, and the land whereon the said buildings now stand, *by the description* of, *four* messuages, *one* cloth mill, *four* barns, *four* stables, *one* wharf, *four* curtilages, *four* gardens, *four* orchards, *thirty* acres of land, *thirty* acres of meadow, and *thirty* acres of pasture, with the appurtenances, in the parish of *Stonehouse*, in the said county of *Gloucester*. Whereupon a certain plea of covenant was summoned between them, in the same Court, to wit, that the said *Richard Dennison Cumberland*, and *Susannah* his wife, had acknowledged the said messuages or tenements, with the land and appurtenances, to be the right of the said *Saul Lusty*, as those which the said *Saul Lusty* had of the gift of the said *Richard Dennison Cumberland*, clerk, and *Susannah*, and the same remitted, and quitted claim, from the said *Richard Dennison Cumberland*, clerk, and *Susannah*, and the heirs of her the said *Susannah*, to the said *Saul Lusty*, and his heirs, for ever. And, further, that the said *Richard Dennison Cumberland*, clerk, and *Susannah* his

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wife, granted, for themselves and the heirs of the said *Susannah*, that they would warrant to the said *Saul Lusty*, and his heirs, the said messuages or tenements, with the land and appurtenances, against the said *Richard Dennison Cumberland*, clerk, and *Susannah*, and the heirs of the said *Susannah*, for ever, which said fine, levied in the manner aforesaid, was engrossed, and was afterwards publicly and solemnly read and proclaimed in the said Court, according to the form of the statute in such case made and provided, in manner following, (that is to say), the first proclamation was made before the said late King's Justices, at *Westminster* aforesaid, in *Trinity* Term, aforesaid, 1819; the second proclamation was made in *Michaelmas* Term, 1819, aforesaid; the third proclamation was made in *Hilary* Term, 1820; and the fourth proclamation was made in *Easter* Term, 1820, aforesaid, *as by the said fine and proclamations made thereon, now remaining of record* in the said Court of the *Bench* aforesaid here, *more fully appears*. And the tenant further saith, that the said fine, so had and levied as aforesaid, was had and levied to such uses, upon such trusts, to and for such intents and purposes, and with, under, and subject to, such powers, provisoes, agreements, and declarations, as he, the said tenant, by any deed or deeds in writing or writings, with or without power of revocation, to be executed by him, in the presence of, and attested by, two or more credible witnesses, should from time to time direct, limit, or appoint the same, and in default of, and until, such direction, limitation, or appointment, and so far as the same, if incomplete, should not extend to the use and behoof of the said *Saul Lusty* and his assigns, for and during the term of his natural life, without impeachment of waste, and from and immediately after the determination of that estate, by any means in his lifetime, to the use and behoof of one *Charles Lawrence*, his executors, administrators, and assigns, for and during the term of the natural life of the said *Saul Lusty;* in trust nevertheless for him the said

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Saul Lusty, and his assigns during his life, and to the intent that no future wife of the said *Saul Lusty*, might become entitled to dower in or out of the said hereditaments and premises, and from and after the determination of the said estate, so thereby acknowledged to have been granted in use to the said *Charles Lawrence* and his heirs, during the life of the said *Saul Lusty*, to the use of the said *Saul Lusty*, his heirs and assigns for ever. And the tenant further says, that, after the levying of the said fine and declaration of the uses thereof, as aforesaid, to wit, on the 1st *July*, 1819, aforesaid, he, the said tenant, entered into and upon the said messuages or tenements, with the land and appurtenances; whereby, and by virtue of the said fine so had and levied as aforesaid, and by force of the statute for converting uses into possession, he, the tenant, then and there became, and was, and yet is, seised, in his demesne as of freehold, for the term of his natural life, of and in the said messuages or tenements, with the land and appurtenances aforesaid, to wit, at &c., aforesaid. And this he is ready to verify. Wherefore, he prays judgment, if the demandant ought to have his seisin *of and in the messuages or tenements, with the land and appurtenances, in the said count mentioned.*"

To this last plea, the demandant demurred specially, as follows: — "And as to the plea of the tenant by him lastly above pleaded, as to the said messuages, mills, barns, stables, out-houses, gardens, orchards, and *thirty* acres of land, *thirty* acres of meadow, and *thirty* acres of pasture, with the appurtenances, *parcel* of the said land in the said count mentioned; the demandant saith, that the said last-mentioned plea, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient, in law, to bar the demandant from having his seisin of the said messuages or tenements, with the land and appurtenances, in the said count mentioned; to which said last-mentioned plea, and the matters therein

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contained, in manner and form as the same are above pleaded and set forth, the demandant is not under any necessity, nor in any wise bound, by the law of the land, to answer. And this, he, the demandant, is ready to verify: wherefore he prays judgment, and that he may have his seisin of the said messuages or tenements, with the land and appurtenances, in the said count mentioned, &c. And for causes of demurrer, in law, to the said last mentioned plea, the demandant, according to the form of the statute, in such case made and provided, sets down, and shews to the Court here, the causes following: (that is to say)—For that the said last-mentioned plea is double, in this, (to wit), that the tenant hath thereby stated and alleged that the said *Robert Sandford* gave and devised the said messuages or tenements, with the land and appurtenances, in the introductory part of the said last plea mentioned, unto, and to the use of the said *Robert Timbrell*, his heirs and assigns for ever, and that the said *Robert Timbrell*, gave and devised the same unto his sister, the said *Susannah Cumberland*, and her heirs, for ever; and hath also pleaded and set forth therein, a certain fine supposed to have been had and levied in his said late Majesty's Court of the *Bench* here, at &c. aforesaid, before &c., then his Majesty's Justices of the *Bench* aforesaid, and other faithful subjects of our Lord the King, then there present, between the said *Saul Lusty* (the tenant), complainant, and the said *Richard Dennison Cumberland*, and *Susannah*, his wife, deforciants, of *all the said tenements* in the introductory part of the said last plea mentioned, and the land whereon the said buildings now stand, *by the description of four* messuages, *one* cloth mill, *four* barns, *four* stables, *one* wharf, *four* curtilages, *four* gardens, *four* orchards, *thirty* acres of land, *thirty* acres of meadow, and *thirty* acres of pasture, with the appurtenances, in &c., aforesaid, and that the said fine was afterwards publicly and solemnly read and proclaimed, in the said Court here, as in the said last plea is also mention-

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ed. And also for that, although the said last-mentioned plea appears, by the commencement thereof, to have been pleaded *as to the said messuages*, mills, barns, stables, out-houses, gardens, orchards, and *thirty* acres of land, *thirty* acres of meadow, and *thirty* acres of pasture, with the appurtenances, *parcel of the said land*, in the said count mentioned; yet it is further stated and alleged, in and by the said last-mentioned plea, that the demandant ought not to have his seisin *of the messuages or tenements, with the land and appurtenances in the said count mentioned, or any part thereof:* and the said last-mentioned plea is concluded with a prayer of judgment, if the said demandant ought to have his seisin *of and in the messuages or tenements, with the land and appurtenances, in the said count mentioned.* And also for that it appears, by the description of the premises, whereof the said fine is supposed to have been so had and levied as aforesaid, that the same was not had, and levied, of *all the said tenements* in the introductory part of the said last plea mentioned, and as to which the said last-mentioned plea was and is so pleaded as aforesaid. And also, for that the tenant hath not verified the said supposed fine *by the record thereof*, but hath concluded the said last-mentioned plea with a general verification and prayer of judgment, and hath thereby attempted to put in issue matter of record, and make the same triable by the country. And also, for that the said last-mentioned plea is in other respects uncertain, insufficient, and informal, &c."

The tenant joined in demurrer.—

The cause now came on for argument, when—

Mr. Serjeant *Russell*, in support of the demurrer, raised four objections to the plea:—

First, that it was double.

Secondly, that, although it began by selecting *part* only of the premises mentioned in the count, it averred that

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the demandant ought not to have seisin of *all, or any part*, and concluded with a prayer of judgment of *all*.

Thirdly, that the fine, as pleaded, did not cover the premises mentioned in the introductory part of the plea.

And *fourthly*, that the plea concluded with a general verification, instead of concluding with a verification *by the record*, as to the fine.

As to the *first* objection.—The plea is double, inasmuch as it alleges two distinct defences, which require several answers, each of which would be, of itself, a complete bar to the action without the other; viz. *first*, the *devise* by *Robert Sandford*, from which it appears that the demandant, claiming as heir, can have no title; and *secondly*, the *fine* levied by the disseisors.—This plea has been drawn on the mistaken notion, that it is necessary to shew a complete title in the tenant; whereas, it is enough to shew that the title set up by the demandant fails; as in ejectment, where it is sufficient to shew that the lessor of the plaintiff had no right to enter. Here, there is a complete defence, by shewing that the demandant's ancestor did not die intestate. It is as complete a defence, as that stated in the *first* plea, *viz.* that the demandant was not cousin and heir of *Robert Sandford*. That is a sufficient defence, without stating that the *tenant* is heir, or is privy to one who is. And so it is as complete a defence as that stated in the *second* plea, *viz.* that *Robert Timbrell* did not abate. So it would have been a complete defence to have alleged in the last plea, that *Robert Sandford* devised to *Robert Timbrell*, without deriving the tenant's title from the devisee. The fine alone would also be a complete answer without the devise; for it is averred that *Richard Dennison Cumberland*, and *Susannah* his wife, were *seised*, and, being so seised, levied a fine; and whether they were then seised by right or by wrong, as rightful devisees, or as wrongful disseisors, is altogether immaterial to the effect of the fine; which would, in either case, be equally a bar to the demandant. It must, however, be admitted, that if the

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fine could not have been stated without mentioning the devise, and the tenant meant to rely on the fine, then, by pursuing the proper form, both might have been stated without duplicity, according to the rule, that when a party has two matters, and cannot come at one without alleging the other, the statement of both will not make his plea double. It is a general rule, that if a plea contain two distinct matters of defence, where one is sufficient, it is bad; and in *Viner's Abridgment* several instances are stated: *vis.* (*a*) "in assize, the tenant pleaded a gift in tail and confirmation in fee, this is double." Again, (*b*) "in assize, the tenant pleaded in bar, that *J. S.* was seised, and leased to *A.* for life, and, after, granted the reversion to his father, and the tenant attorned and died, and the father entered and died, and the tenant entered, as heir, and gave colour: the Court held, that this grant of the reversion, and the entry of the heir upon this title, were double, though he did not plead it as a dying seised; for, if the father was disseised and died, and he re-entered, he was in as heir, and the entry of another toll'd, and so double, by which he relied upon the grant of reversion." "So of a lease for life, and a release, it is double; for the one of the matters, with colour to the plaintiff, makes a good bar. So of a grant of the reversion in assize, and, after, the tenant surrendered, and the grantee died seised, this is double, for the dying seised is sufficient" (*c*). So, a plea is not double, if one matter be pleaded only as inducement to the other; as, in detinue by a woman, the defendant may plead, that she took husband, who released, on the ground that he cannot plead the release of the husband, without shewing that the plaintiff married him (*d*). But, in the present case, it is clear, that the two matters might have been divided, and have formed two distinct pleas: *vis.* the one, the devise, and so the heirship unavailing; the

(*a*) Vin. Abr. tit. "Double Pleas," A. 23.

(*b*) Ib. 24.

(*c*) Ib. 26.

(*d*) Bac. Abr. tit. "Pleas and Pleadings," K. 2.

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other, that *Richard Dennison Cumberland*, and *Susannah* his wife, being seised in fee, levied *a fine*. And even supposing the rule which admits of the allegation of one matter of defence in order to come at the other, to apply to the matters here pleaded, the proper form has not been pursued. The plea should have concluded by relying upon the fine, as in *Rastal* (*a*), "*et hoc paratus est verificare, unde petit judicium si prædictus J. S. actionem suam prædictam contra finem prædictam cum proclamationibus prædictis levatam versus eum habere debet, &c.*" There the fine was relied on as a defence; and, by such a conclusion, it was made evident on which of the matters pleaded, the tenant relied; here, however, it is doubtful, whether he relied on the fine, or on the devise; and it will be found that many of the decisions, on questions of duplicity, have turned upon this mode of pleading. In *Viner's Abridgment*, (*b*) "Entry sur disseisin, made to *C.* his cousin, whose heir he was, (*viz.* *C.* was the daughter of *T.*, sister of the *demandant*), the tenant said, that *J.*, brother of the demandant, whose heir the demandant was, was seised in fee, and gave to *T.* and *A.*, in tail, between whom *C.* was issue; and *C.* died without heir of her body, and *J.*, the brother, entered as in his reversion, and enfeoffed the tenant, and after, by his deed, released to the tenant. Judgment, if against the deed, comprehending warranty, &c., and because he relied upon the deed, with warranty, therefore good, notwithstanding that he alleged tail, where the demandant demanded fee simple, and the feoffment and release with warranty." So, in *Comyns's Digest* (*c*), it is said, "a plea is not double, if one matter cannot be well pleaded without the other, and the defendant rely upon one; as if two statutes be pleaded for the repeal of a former law, if the one have reference to the other; so, if a man plead a feoff-

(*a*) Entre brevis sur disseisin, 277.

(*b*) Tit. "Double Pleas," A. 67.

(*c*) Tit. "Pleader," (E. 2.)

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ment with warranty, and rely only on the warranty; or if the defendant plead that the principal rendered himself and died, and rely on the death; so, in detinue, if the defendant plead that the plaintiff married after bailment, and the husband released to him." Here, therefore, the tenant should have shewn whether he meant to rely on the fine or not; and unless this mode of pleading be adopted, how can the demandant answer? for, if he traverse the devise, he will leave a complete defence admitted on the record, *viz.* a fine levied by disseisors; or, if he traverse the fine, a complete defence will be also left admitted, *viz.* the devise, which renders his heirship of no avail: and he cannot traverse both.

As to the *second* objection.—Although the plea begins by selecting *part* only of the premises mentioned in the count, it avers that the demandant ought not to have seisin of *all*, or any part, and concludes by praying judgment of *all*.—This is clearly bad; for, supposing the tenant to have shewn, by his plea, a defence as to the portion of the premises mentioned in the introductory part, that can afford no ground for judgment as to the *whole*. In a personal action, where particular trespasses, or the like, are selected from the declaration, and justified; after the *quæ sunt eadem*, the defendant's prayer of judgment is, "if the said plaintiff ought to have or maintain his action *thereof* against him, &c.:" and the word "thereof" confines the prayer to the trespasses mentioned in the introductory part of the plea.

As to the *third* objection.—The fine, as pleaded, does not cover the premises mentioned in the introductory part of the plea; as such fine appears by the plea itself to be levied of less.—The introductory part of the plea mentions, generally, the messuages, mills, barns, stables, out-houses, &c. in the count, which are, *six* messuages, *six* mills, *two* barns, *two* stables, *six* out-houses, *six* yards, *two* gardens, and *two* orchards; whereas the premises in the fine (except the land) consist only of *four* messuages, *one* cloth

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mill, *four* barns, *four* stables, *one* wharf, *four* curtilages, *four* gardens, and *four* orchards. A fine affecting *four* messuages and *one* cloth mill only, cannot be a bar to the recovery of *six* messuages and *six* mills. It is a clear and established rule of pleading, that every plea must be a complete answer to all it assumes, in its introductory part, to answer. One of the most recent cases in support of this doctrine is that of *Thomas* v. *Heathorn* (*a*), where, to a declaration in *assumpsit* by the assignees of a bankrupt, which stated that the defendant was indebted to the bankrupt before his bankruptcy in 1000*l.* for goods sold, &c., and concluded by stating that the plaintiff had sustained damage to that extent; the defendant pleaded, that before the bankruptcy, upon an account stated between the bankrupt and the defendant, the latter was found to be indebted to the bankrupt in 400*l.*, for which *said* sum the bankrupt drew a bill upon the defendant, which the defendant accepted for and on account of the said several premises in the declaration mentioned, by reason whereof the defendant became liable to pay the bill.—The plaintiff having replied over, it was held, upon demurrer to the replication, that the plea was bad, inasmuch as it was pleaded to the whole of the demand, and the giving a bill for 400*l.* was not, in point of law, a satisfaction of 1000*l.*, the amount of the debt claimed; and Mr. Justice *Bayley* there said, "it is perfectly clear that a plea which professes to be an answer to the whole declaration, but which in fact is an answer to part only, is bad."

As to the *fourth* objection.—The plea does not conclude with a verification by the record, *as to the fine*, but with a general verification.—It should have been, "and this he, the said tenant, is ready to verify by the said record." It is laid down in *Comyns's Digest* (*b*), that if a matter of record be pleaded, the plea shall conclude "*prout patet*

(*a*) 2 Barn. & Cres. 477; *S.C.* 3 D. & R 647. (*b*) Tit. "Pleader," (E. 29.)

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per recordum." So if a matter be pleaded, proveable only by a record, and the plea conclude "*et hoc paratus est verificare,*" when it ought to be "*prout patet per recordum,*" it is bad; or, if it conclude to the country, when it should conclude to the record: but when there is a complete issue between the parties, *viz.* a direct negative and affirmative, the plea shall conclude to the country (*a*). It must, however, be admitted, that, in many cases where matters of record are mentioned in a plea, such plea may sometimes conclude to the country; but this is where some matter of fact is the principal thing to be put in issue. Here, the *fine* is not merely mentioned in the plea, but it is the principal thing; it is averred as the record of the tenant's right. The only possible ground upon which the plea can for a moment be supported against the objection of duplicity, is this: *viz.* that the *devise* is only *inducement*, and the *fine*, the *material* and *real* defence; and this cannot be tried by a Jury, being matter of record.

Mr. Serjeant *Peake, contrà.—First*, There is no duplicity in the plea to which the objections have been raised; for, in order to make a plea double, several matters of defence must be stated, which are inconsistent with each other, or which require several answers to the same thing. But if a plea contain many parts, yet all forming but one connected proposition, it is not double. So a plea is not double, where one matter alleged is a consequence of the other, or is pleaded only by way of inducement; as in the case put, of detinue by a married woman, where the defendant pleaded, that, after bailment of the goods to him by the plaintiff, she married, and that, during such marriage, the husband released to the defendant all actions, &c.; and it was objected, that the plea was double, *viz.* property in the husband by intermarriage,

(*a*) Comyns's Digest, tit. "Pleader," (E. 32).

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and a release by him; yet it was resolved not to be double, because the defendant could not plead the release without shewing the marriage. Although, therefore, the plaintiff's coverture might have been a defence, yet, as it was only pleaded by way of inducement, it was held to be good. Here, however, there is no inconsistency on the face of the plea. It was incumbent on the tenant to shew that the parties levying the fine were seised, and that such seisin was created by the devises of *Sandford* and *Timbrell*. It may be said, that this mode of pleading is inconvenient; but if any allegation in a plea be disproved, the plea is void altogether, on the well-known principle, that a plea which is bad in part, is bad as to the whole. A party, by traversing one fact, does not thereby admit others contained in the plea, and which are not traversed. In *Comyns's Digest* (*a*), it is laid down as a general rule, that a plea is not double, where one matter alleged is pleaded only as inducement to the other. In *Calfe* v. *Nevil* (*b*), which was an action of *scire facias* against bail, they pleaded, that, after the *scire facias* returned, and shortly after judgment, their principal brought a writ of error, pending which he rendered himself to prison in discharge of his bail, and there died, and the plaintiff demurred to the plea, on the ground that it was double. But the Court held otherwise, as the principal's rendering himself to prison, and being imprisoned, were but inducement to his dying there. In *Plowden's Commentaries* (*c*), it is said, that "to allege two descents in tail does not make a plea double, for one answer, *viz. ne dona pas*, makes an end of the whole; so that the descents are not the most substantial parts of the matter, but the gift, and in shewing of the gift, the defendant must shew how it came to the last issue; and, forasmuch as he is necessarily compelled to do that, it is not double." Here it was not sufficient for the tenant

(*a*) Tit. "Pleader," (E. 2). (*b*) Poph. 185. (*c*) Page 140.

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to traverse the demandant's title; it was necessary for him to deduce his own; and the entry cited from *Rastal* is an authority to shew that it was incumbent on him to do so; and although it has been said, that the tenant should have concluded his plea by relying on the fine, yet that objection was not raised by the demurrer; and the devises were matters *in pais*, and might have been traversed.—*Secondly*, It has been said, that, although the plea begins by selecting part only of the premises mentioned in the count, yet it avers, that the demandant ought not to have seisin of all, and concludes by praying judgment of *the whole*. But the Court have authority to order a right judgment to be entered up, although the prayer at the conclusion of the plea be improper; and if so, the judgment must be entered for the messuages and lands in the introductory part of the plea mentioned. In *Le Bret* v. *Papillon* (*a*), where one, who was an alien *amy* at the time of action brought, became an alien enemy before plea pleaded; and the defendant pleaded in bar, that the plaintiff ought not *to have or maintain* his action, "because he was, before *and at the time of exhibiting his bill*, and now is, an alien enemy, &c." and concluding, that therefore the plaintiff ought to be barred from *having or maintaining* his action &c.; to which the plaintiff replied, that, *at the time of exhibiting his bill*, he was an alien *amy;* wherefore he prayed *judgment and his damages:* to which there was a special demurrer, as it did not answer the whole of the defendant's plea. Although it was held that the plea was ill pleaded, yet, as the Court were, *ex officio*, bound to give such judgment as appeared, upon the whole record, to be proper, without regard to the issues found or confessed, or to any imperfection in the prayer of judgment, on either side; and as it appeared upon the whole record, that the plaintiff was then an alien enemy, and therefore incapable of main-

(*a*) 4 East, 502.

taining further his suit, judgment was given, that he *be barred from further having or maintaining his action;* and Lord *Ellenborough* there said, " it is also urged on the part of the defendant, that even if the plea be bad, as pleaded in bar generally, yet, that the replication is bad, in praying a judgment for damages, which cannot be given in favour of this plaintiff, inasmuch as he appears by the record to be *now an alien enemy*, and of course incapable of recovering damages. And on this account it is contended, that, inasmuch as the plaintiff cannot recover the judgment he prays, he must be barred from maintaining his action generally, according to the prayer of the defendant's plea. But this by no means follows; for the Court may, and ought, *ex officio*, to give such judgment, on the whole record, as ought to be given, without regard to the issues found, or to any imperfection in the prayer of judgment made on either side. In *Plowd.* 66, *Montague*, C. J., speaking of the plea of the defendant in that case, says, 'He ought to have concluded *non est factum*, and not judgment *si actio*, as he has done; for which reason the conclusion is bad. Further, inasmuch as the conclusion in this point is bad, it is to be seen what shall be done if it appear to us Judges that, upon the matter in law, the deed is void; and it seems to me (he says) that we, by our office, ought to give judgment against the plaintiff; for, although the defendant may not take the advantage, yet, inasmuch as it appears to us that the plaintiff has no cause of action, we ought to give judgment against him.' And afterwards, p. 69, 'he shall have benefit by the office of the Judge, notwithstanding the bad conclusion to the action, as I have said before.' So also in *Fraunces's* case (*a*), and *Westlie* v. *King* (*b*), to the same effect. And, indeed, if it were necessary to cite authorities on such a subject, in *Kirk* v. *Nowell* (*c*), and in many other cases,

(*a*) 8 Co. 93. (*b*) Winch, 75. (*c*) 1 Term Rep. 125.

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judgment has been entered up according to the right appearing in favour of the plaintiff, on the whole record, notwithstanding an issue, on a bad plea in bar, found against him. In *Street* v. *Hopkinson* and others (*a*), the Court held expressly, that they were not bound by the prayer of an improper judgment; and therefore pronounced the rule, "that the plaintiff in error, in that case, should be barred, contrary to the terms of the defendant's prayer, which was, that judgment might be affirmed." That principle has been since recognised in the case of The *King* v. *Shakespear* (*b*), where a distinction was taken between pleas in abatement, and pleas in bar. There, a plea of *misnomer* in abatement, concluded with praying judgment *of* the said indictment, instead of *on;* and Lord *Ellenborough* said, "if this were the case of a plea in bar, the Court would give that judgment which, upon the whole of the record, appeared to be the proper judgment, though not regularly prayed for by the party. But in abatement the Court will give no other than the proper judgment prayed for by the party;" and in *Attwood* v. *Davis* (*c*), where the proceedings were by *bill*, and the defendant's plea in abatement concluded with a prayer of judgment of the *writ* and declaration founded thereon, although such plea was held bad on special demurrer, yet Mr. Justice *Bayley* said "there is a distinction between a plea in bar, and a plea in abatement; in the former, the party may have a right judgment upon a wrong prayer, but not in the latter." These cases are precisely in point to shew that the second objection to this plea cannot be supported. *Thirdly.*—It has been contended, that the fine, as pleaded, does not cover the premises mentioned in the introductory part of the plea, as the fine set out in the plea appears to be levied of less. But that objection cannot avail on demurrer. It is a matter of fact to be proved at the trial. The de-

(*a*) 2 Str. 1055; and Rep. Temp. Hardw. 345.

(*b*) 10 East, 83.

(*c*) 1 Barn. & Ald. 172.

scription of buildings erected on land, may vary according to circumstances; and the fine need not be confined in terms to the actual description of the premises therein contained; and it is quite clear, that if a fine be levied of lands, it will carry all the buildings erected thereon.

The learned Serjeant was about to argue on the *fourth* objection, as to the plea's not concluding with a verification by the record, as to the fine, when he was stopped by the Court, who said, that he need not trouble himself on that point.

Mr. Serjeant *Russell*, in reply.—The plea, at least, causes a serious inconvenience to the demandant, as, whether he traverse the devise, or the fine, a complete defence will be left admitted on the record. There must be one connected defence; and there cannot be a connection of separate defences. In *Viner's Abridgment* (*a*), "in an entry in nature of assize, the defendant pleaded that he was in by lease for forty years of the lease of the predecessor of the plaintiff, by indenture, and so had he nothing but for terms of years, and that the demandant himself was seised of the frank-tenement; and there was judgment of the writ; the whole Court held, that this was a double plea, *viz.* lease by indenture, and that the plaintiff himself was seised of the frank-tenement; for if the plaintiff answered to the lease, the other might demur, because he did not deny but that he himself was tenant of the frank-tenement; and if he answered to the frank-tenement, the other might likewise rely upon the lease by indenture, which is estoppel; by which he was awarded to hold him to the one; and so he did, *viz.* that the plaintiff himself was tenant." So here, the tenant should either have relied on the devise, or on the fine; and the plea is bad at all events, by praying judgment of the whole of the premises, as it commences by stating part only.

(*a*) Tit. "Double Pleas," A. 68.

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The Court proposed that the plea should be amended, and the demurrer withdrawn; which not being acceded to on the part of the demandant, they took time to consider: and, on this day, Mr. Justice PARK delivered the judgment of the Court as follows:—

This case comes before the Court upon a demurrer to a plea to a writ of entry. The plea on which this question arises, is in substance as follows, *viz.* "as to *the said* messuages, mills, barns, stables, out-houses, gardens, orchards, and *thirty* acres of land, &c., *parcel* of the said land in the said count mentioned, the demandant ought not to have his seisin of the messuages or tenements, with the land and appurtenances, in the count mentioned, or any part thereof; because, although true it is, that *Robert Sandford*, deceased, was, in his life time, and at the time of his death, seised in fee of the messuages, &c., in the introductory part of the plea mentioned, and, being so seised, made his will, and devised the premises to one *Timbrell* in fee, who afterwards devised them to his sister *Susannah*, the wife of *Richard Dennison Cumberland*, and her heirs for ever; who, in *Trinity* Term, 59 *Geo. 3*, levied a fine, in this Court, with proclamations, to the tenant, of all the tenements in the introductory part of the plea mentioned, and the land whereon the buildings then stood, by the description of, *four* messuages, *one* cloth mill, *four* barns, *four* stables, *one* wharf, *four* curtilages, *four* gardens, *four* orchards, *thirty* acres of land, *thirty* acres of meadow, and *thirty* acres of pasture, with the appurtenances." The tenant then averred, that, after the levying of the fine, he entered upon the said messuages, and that by force of the fine so had and levied, and by force of the statute for converting uses into possession, he became, and was, and yet is, seised in his demesne as of freehold for the term of his life. Wherefore he prayed judgment, if the demandant ought to have his seisin of and

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in the messuages or tenements, with the land and appurtenances, in the count mentioned. This, it is said, is duplicity in pleading; for that either of the matters mentioned, *viz.* the devise by *Timbrell*, or the fine levied by *Lusty*, the plaintiff, and *Cumberland* and his wife, deforciants, furnishes a complete defence, and ought not to have been included in the same plea. We are, however, of opinion, that there is no ground for this objection. No matter will operate to make a pleading double, that is only pleaded as a necessary inducement to another allegation. I admit the rule laid down by Lord Chief Baron *Comyns* (*a*), that if a plea contain duplicity, and allege several distinct matters (which require several and distinct answers) to the same thing, it would be bad. But no matters, however multifarious, will operate to make a pleading double, provided that all taken together constitute but one connected proposition, or entire point. Try the present case by this rule, and it will be found, that though there be a devise stated by *Timbrell* to Mrs. *Cumberland*, and a fine levied by her and her husband, they constitute but one entire proposition, one entire point of defence. Thus, if to an action of assault and false imprisonment (*b*), the defendant plead that he arrested the plaintiff on a suspicion of felony, he may set forth any circumstances of suspicion, though each circumstance may alone be sufficient to justify the arrest; for all of them taken together do but amount to one connected cause of suspicion.

The true rule in pleading I take to be this, that duplicity is, where two distinct matters, not being part of one entire defence, are attempted to be put in issue. But this can never apply to, nor does it ever preclude a person from, introducing several matters into a plea, if they be constitu-

(*a*) Com. Dig. tit. "Pleader," (E. 2.)

(*b*) Vin. Abr. tit. "Double Pleas," A. 7.

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ent parts of the same defence. For though it be true that issue must be taken on a single point, yet it is not necessary, nor ever can be, that such single point must consist only of *one single fact*. This is well illustrated by the case of *Robinson* v. *Rayley* (*a*), where, to an action of trespass the defendant had, amongst other things, pleaded a right of common; and the plaintiff, in his replication, traversed that the cattle were the defendant's own cattle, that they were *levant and couchant*, and that they were *commonable* cattle; to this there was a special demurrer, that the replication was multifarious, and that several matters, specifying them, were put in issue, whereas only one single matter ought to have been so. Lord *Mansfield's* judgment upon this point was as follows:—"The substantial rules of pleading are founded in strong sense, and in the soundest and closest logic; and so appear, when well understood and explained; though, by being misunderstood and misapplied, they are often made use of as instruments of chicane. As to the present case,—it is true, you must take issue upon a *single point*; but it is not necessary that this single *point* should consist *only* of a single *fact*. Here the *point* is, the cattle being *entitled to common*. This is the single point of the defence. But in *fact* they must be both his *own* cattle, and *also* levant and couchant; which are two different essential circumstances of their being entitled to common, and *both* of them absolutely requisite."

We are therefore of opinion that there is no duplicity in this plea. The tenant has chosen to set out his whole title; which, though it may consist of several matters, conduces to one common end, *viz.* a complete bar, if true, to the claim of the demandant.

The second objection is, that the introduction to the plea selects only a part, and yet concludes as to the whole. To

(*a*) 1 Bur. 316.

this the Court answer, that this prayer to a plea in bar may be set right. In *Le Bret* v. *Papillon*, Lord *Ellenborough* said (*a*), "in many cases judgment has been entered up, according to the right appearing in favour of the plaintiff, on the whole record, notwithstanding an issue, on a bad plea in bar, found against him. In *Street* v. *Hopkinson* and others (*b*), the Court held expressly, that they were not bound by the prayer of an improper judgment; and therefore pronounced the rule, that the plaintiff in error in that case should be barred, contrary to the terms of the defendants' prayer, which was, that the judgment might be affirmed." The same doctrine was established in The *King* v. *Shakespear* (*c*); and, in *Attwood* v. *Davis* (*d*), Mr. Justice *Bayley* said, "there is a distinction between a plea in bar, and a plea in abatement; in the former, the party may have a right judgment on a wrong prayer, but not in the latter."

The third objection is, that the fine, as pleaded, does not cover all the premises in the declaration or plea mentioned, for that the plea, in its introductory part, speaks of *six* messuages, whereas the fine speaks only of *four*. But the plea states, that the fine was levied "of *all* the messuages in the introductory part of the plea mentioned, and the land whereon the said buildings now stand, by the description of *four* messuages, &c." Therefore we say, it will be a matter of fact, to be proved by the evidence, whether or not this allegation be true.

The fourth objection is, that this fine is not verified by the record. This argument is not true in fact; for, after setting out the fine, the plea says, "as by the said fine, and proclamations made thereon, now remaining in the said Court of the *Bench* more fully appears." But it is said that this averment ought to have formed the conclu-

(*a*) 4 East, 509.
(*b*) 2 Str. 1055; *S. C.* Cas. temp. Hardw. 345.
(*c*) 10 East, 83.
(*d*) 1 Barn. & Ald. 172.

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sion to the *whole* plea. It seems to us that this would have been absurd; for the fine does not constitute the whole of the defence. The plea is made up of several distinct matters, though conducing to one point; *viz.* the tenant's title. The tender, therefore, in conclusion, to the Court, must be on the whole matter; and though one of the matters be upon the fine, which is verified by the record in its proper place, yet it would not have been true, that the whole matter of the plea was verified by the record, when a part of that plea was the devise to Mrs. *Cumberland*, which does not appear by any matter of record. For these reasons, we are of opinion that there must be—

Judgment for the tenant.

Friday, Nov. 23rd.

LOUKES *v.* HOLBECHE.

A party outlawed can only appear in Court for the purpose of reversing his outlawry.

Where, therefore, a defendant, the grantor of an annuity, who had been outlawed in an action in the Court of *King's Bench*, for arrears, applied to this Court to set aside the securities, on the ground of an illegality in the grant in the first instance:—Held, that he could not be heard.

A RULE was obtained by Mr. Serjeant *Wilde* in the last *Easter* Term, to shew cause why an annuity, granted by the defendant to the plaintiff, should not be set aside, and the indenture and warrant of attorney, given and executed for the same, delivered up to be cancelled, and the judgment vacated, on the grounds, *first*, that part of the consideration-money for such annuity was retained by, or returned to, the plaintiff, or his agent; and *secondly*, that the memorial was defective, in not correctly setting out the annuity, or the consideration paid for the same, or the term for which such annuity was to be paid.

Mr. Serjeant *Bosanquet* shewed cause, on affidavits, which stated, that the annuity was granted in *January*, 1812, and paid by the defendant until 1823, without any objection having been raised. That the plaintiff (the grantee) died in that year; and that a person of the name of

Hicks, who negotiated for the annuity, as his agent, and was present at the execution of the deeds, had died two years previously. That after the death of the grantee, *viz.* in *Hilary* Term, 1825, his executors arrested the defendant for a half-year's arrears of the annuity, on process issued out of the Court of *King's Bench*, on which they obtained judgment, and proceeded to outlawry against him in that suit. That the defendant, in *Trinity* Term in that year, obtained a rule, in that Court, to set aside the annuity, and that the securities might be delivered up to be cancelled, on the grounds of a retention of part of the consideration, by the plaintiff or his agent, and a defect in the memorial; which rule was discharged with costs in *Michaelmas* Term following. That such costs had been afterwards taxed, but not yet paid by the defendant; and that he had also moved the Court of *King's Bench*, that the proceedings on the outlawry might be stayed; which rule was also discharged with costs. The plaintiff's attorney also swore that he believed that the defendant had for some time past absented himself by fraud and covin, to avoid legal process, and that he was then residing out of the jurisdiction of this Court. Under these circumstances, the learned Serjeant objected, in the first instance, that, as the defendant had been outlawed in an action brought against him by the executors of the grantee, in the Court of *King's Bench*, for the arrears of the annuity now sought to be set aside, he was not in a situation to make the present application; nor could he be heard in this Court for the purpose of impeaching the annuity, and more particularly so, as the costs, as taxed, on the former motions made by him in the Court of *King's Bench*, had not yet been paid.

Mr. Serjeant *Wilde*, in support of his rule.—Although the defendant has been outlawed, yet that does not disable him from making the present application to set aside the

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annuity on which the outlawry proceeded in the Court of *King's Bench*. If a writ of error be brought to reverse an outlawry, outlawry in another suit cannot be set up against it; nor when a party outlawed brings a writ of error to reverse an outlawry, shall outlawry in that suit, nor any stranger's, disable him; for, if he were outlawed at several men's suits, and one should be a bar to another, he could never reverse any of them: and if it be for error in the same outlawry, the outlawry itself is no objection; for that would be *exceptio ejusdem rei cujus petitur dissolutio* (*a*).

The Court required a copy of the record of the outlawry to be produced, as well as an affidavit of the identity of the defendant; as if the record were looked at, it might appear that he had not been duly outlawed; and they ordered the rule to be enlarged to the first day of this Term for that purpose, Lord Chief Justice *Best* observing, that the proceedings to outlawry had taken place for non-payment of the arrears of the annuity now sought to be set aside; and that the defendant could raise no defence, either at law or in fact, till the outlawry was got rid of. Neither could he move to set aside the annuity till the outlawry were reversed; this not being an application to reverse or set it aside, as in *Gilbert*, but an attempt to put in a defence before the outlawry is reversed. The rule was enlarged accordingly.

Mr. Serjeant *Bosanquet*, on a former day in this Term, produced a copy of the record of the outlawry, together with an affidavit of the identity of the defendant, and also an affidavit, stating that the defendant, in the last Term, had obtained a rule *nisi* in the Court of *King's Bench*, to reverse the outlawry, and that such rule had been discharged with costs. The learned Serjeant submitted, that it was quite clear, that the defendant could

(*a*) Gilb. C. P. 3d Ed. 197.

[Mr. Justice *Burrough*.—The defendant might put himself in a situation to make the application to us, by moving to reverse the outlawry in the Court of *King's Bench*, and putting in, and perfecting, bail in the action.]

The outlawry can only be reversed for irregularity; and as the proceedings were had on final process, it can only be set aside on the defendant's satisfying the plaintiff his debt and damages. Besides, it is sworn that the defendant absented himself by fraud and covin, and to avoid legal process; and in *Havelock* v. *Geddes* (*a*), the issue was, whether the defendant were beyond seas, at the time of the outlawry, by fraud and covin; and if the plaintiff insists on that fact, the defendant cannot now be let in to reverse the outlawry, as it would be an answer to the fact of his being beyond sea.

[Mr. Justice *Park*.—In *Hesse* v. *Wood* (*b*), the Court said, that they had never heard that either the going abroad, or the staying abroad, with a view to avoid process, was a reason why the defendant should not reverse an outlawry when he returned.]

[Mr. Justice *Burrough*.—The defendant's being beyond sea, at the time of the *exigent*, is error in fact, and a good ground to reverse the outlawry on his return.]

At all events, the defendant must suffer great personal inconvenience, as he must appear before he can put in bail, or move to reverse the outlawry, in which case he would be liable to be imprisoned at the suit of the plaintiff.

[Mr. Justice *Gaselee*.—In *Graham* v. *Henry* (*c*), it was held, that the defendant need not appear before he moves to reverse an outlawry; and where he did not go, or continue, abroad for the purpose of avoiding process, the Court reversed the outlawry on motion; and Lord *Ellenborough*

(*a*) See 12 East, 622. (*b*) 4 Taunt. 693.
(*c*) 1 Barn. & Ald 131.

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there said, "it appears that the outlawry took place in the absence of the defendant; if a writ of error therefore had been brought, the outlawry would be reversed as of course;" and Mr. Justice *Abbott* added, "it is quite clear that the defendant would be entitled to reverse this outlawry upon writ of error; the Court may exercise the same power upon motion."]

Here, the substantial question is, whether the defendant went abroad with a fraudulent view, and for the purpose of avoiding process; and, as the Court of *King's Bench* has discharged his rule for reversing the outlawry, he has a right to make the present application to this Court to set aside the grant of the annuity. He is clearly entitled to relief against the subject matter of the outlawry, which may be either afforded him in a court of Equity, or by the summary jurisdiction of this Court. He ought not, at all events, to be precluded from going into the merits of the case by this preliminary and technical objection; and, for the reason stated in *Gilbert*, the outlawry cannot disable him from making the present motion.

The Court,—(after referring to *Comyns's Digest* (*a*), where it is laid down, that, if a man, at the time of his outlawry, be out of the realm, it is error, though he be outlawed for felony, or in a personal action; but that if a man go voluntarily out of the kingdom, *after exigent* for felony pronounced, he shall not avoid the outlawry afterwards pronounced; and to the judgment of the Court in *Serocold* v. *Hampsey* (*b*), where they said "it has been determined that, as to the whole process of outlawry, it is not material, in the assignment of error, to shew that the party was out of the realm during the whole time; but if he were abroad at the time of the *exigent*, that is sufficient; for that is the substance. If the fact were, that he was within the realm

(*a*) Tit. "Utlagary," (C. 1.) (*b*) 12 East, 625 n.

not be heard on this motion, as he could only appear in Court for the purpose of reversing or setting aside the outlawry, which might be done by motion, or writ of error; and, as the proceedings to outlawry were instituted and carried on in the Court of *King's Bench*, this Court cannot interfere in setting aside the annuity, as the applicant has no *locus standi in judicio*. In *Griffith* v. *Middleton* (*a*), in *audita querela* to avoid a statute upon the statute of usury, the defendant pleaded outlawry in the plaintiff, at the suit of *J. S.*, and it was insisted on demurrer, that outlawry in that suit, which was only by way of discharge, and not to recover any thing, was not pleadable. But it was adjudged, that a person outlawed is not receivable to sue in any Court, unless it be to reverse his own outlawry; and Lord Chief Justice *Montague* said, "where the action is *ad lucrandum*, there ought to be ability in the person; and it is all one to gain by way of discharge, as by way of perquisition." That is the true principle, and expressly in point to shew that the defendant is not at present entitled to make this application to the Court.

Mr. Serjeant *Wilde*, in support of the rule.—The outlawry in this case cannot be urged as an objection to the present application. The outlawry was founded on an action brought against the defendant, in the Court of *King's Bench*, to recover the arrears of the annuity which the defendant now seeks to vacate altogether, on the ground of an illegal retention of part of the consideration money by the plaintiff or his agent, at the time the annuity was granted. It is most material to ascertain whether the grant were void or not in the first instance, that being the foundation of the outlawry; and if the grant were invalid or illegal, the grantor may apply to set aside the annuity; and, according to the rule laid down in *Gilbert*, his hav-

(*a*) Cro. Jac. 425.

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ing been outlawed in the same suit is no bar, as he seeks to attack the ground on which the outlawry proceeded, and the whole fabric on which it rests. The case of *Griffith* v. *Middleton* is distinguishable from this, as a judgment in *audita querela* not only operates by way of discharge, but restores the party to all he had lost. In *Bacon's Abridgment* (*a*), it is laid down, that outlawry may be pleaded to a bill in equity, as well as to an action at common law; but that, if the bill be for relief against an action at law, and an outlawry be pleaded by the defendant in the same action, it will not be allowed; because the outlawry is part of the grievance, and it is *exceptio ejusdem rei cujus petitur dissolutio*. In *Mitford's Pleadings in Chancery* (*b*), it is said, that a plea of outlawry, in a suit for the same duty or thing for which relief is sought by the bill, is insufficient, according to the rule of law, and shall be disallowed of course, as put in for delay. If, therefore, the defendant had sought to be relieved from the payment of this annuity by a bill in Equity, instead of by an application to this Court, as the outlawry was for the same thing for which relief was sought, the outlawry could not be pleaded; and here, as it was founded on the grant of the annuity, the defendant may attack it on the ground of illegality in the grant; and, if the deeds be set aside, the outlawry must fall to the ground. Although the outlawry was founded on the judgment in the Court of *King's Bench*, it is clear that the defendant had a right to apply to the Court of *Chancery*. So this Court has, by the statute 17 *Geo.* 3, c. 26, a special and equitable jurisdiction to set aside the deeds by which the annuity was secured; and that statute alone is applicable to this case, (the annuity having been granted before the passing of the 53 *Geo.* 3, c. 141), and gives a jurisdiction analogous to the Great Seal, *viz.* to set aside annuity-deeds on the oath of the party.

(*a*) 5th Edit. tit. "Outlawry," D. 3, Vol. 5, p. 237.
(*b*) 4th Edit, by Jeremy, 226.

an issue on that fact in *Havelock* v. *Geddes*, which was cited as supporting this opinion: but upon looking into the books, we do not find that there is any case which supports this distinction; and the only issue in *Havelock* v. *Geddes* was, whether the plaintiff were beyond sea, or not, at the time of the outlawry. We conceive the truth to be, that, in a mere personal action, if the outlaw bring his writ of error, and assign his being beyond sea at the time of the outlawry, the Court would make no difficulty in reversing it.—The next question will be, on what terms; and that will depend upon the statute 4 & 5 *Will.* 3, c. 18, s. 3. This seems settled in *Serecold* v. *Hampson* (*a*). But it is said that the party, by coming in, may be put to great personal inconvenience, even to imprisonment: with that, however, we can have nothing to do. We think, as matters are now situated, the applicant has no *locus standi in judicio*, except for one purpose; and, as this application has not that purpose in view, this rule must be—

Discharged (*b*).

(*a*) 2 Str. 1178.

(*b*) Mr. Justice *Park* afterwards referred to the case of *Bryan* v. *Wagstaffe*, 5 Barn. & Cres. 314; *S. C.* 8 Dow. & Ryl. 208, where, in error to reverse an outlawry, the error assigned was, that before and at the time of awarding and issuing the *exigi facias*, the plaintiff in error was beyond seas; and the defendant pleaded, that before the awarding and issuing of the *exigi facias*, the plaintiff in error, of his *fraud and covin*, and in order to defeat the defendant of the means of recovering his just debt, and for the purpose of avoiding the said outlawry, voluntarily left the realm of *England*, and of such his fraud and covin, voluntarily remained in parts beyond the seas, until after the outlawry; whereupon issue was joined, and a verdict found for the defendant;—it was held, that the plea was not an answer to the assignment of error, and that judgment of reversal of the outlawry should be entered for the plaintiff in error, *non obstante veredicto*.

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Saturday, Nov. 24th.

STILL, Demandant; RAYMOND, Tenant; FRANCIS LAW, Esq., First Vouchee; JOHN LAW, D. D., Second Vouchee.

In a recovery, the acknowledgment of the first vouchee was taken at *Calcutta*, 16th *January*, 1827, and the Commissioners, named in the *dedimus*, had omitted to indorse the return thereon, and the word "sixteenth" was written on an erasure in the jurat of the affidavit of the Commissioners, of the acknowledgment of the warrant of attorney. The second vouchee, who was tenant for life, died on the 5th *February*, 1827:—The Court allowed the returns of the writ of entry and summons to be abridged to three returns inclusive, instead of four, as required by the stat. 24 *Geo.* 2, c. 48, s. 8.

THE acknowledgment of the first vouchee in this recovery was taken at *Calcutta*, on the 16th *January*, 1827; and the Commissioners, named in the writ of *dedimus potestatem*, omitted to indorse the usual return thereon; and the word "*sixteenth*" was written on an erasure in the jurat of the affidavit of the Commissioners of the due acknowledgment of the warrant of attorney by the first vouchee. It also appeared that Dr. *Law*, the second vouchee, who was only a tenant for life of the estate to be comprised in the recovery, died on the 5th *February*, 1827; and as the warrant of attorney of the first vouchee was taken on the 11th *January* preceding, there were not four returns inclusive, between the return of the first writ of summons, and the death of Dr. *Law*. Under these circumstances, the clerk of the recoveries objected to its being passed, as the statute 24 *Geo.* 2, c. 48, s. 8 (*a*), requires that there should be four returns *inclusive*, between the first and second writs of summons.

Mr. Serjeant *Bosanquet* now moved that the writ of entry might be amended and made returnable on the morrow of St. *Martin*, in *Michaelmas* Term last, that the first

(*a*) Which, after reciting, that before the making of the act, all writs of summons to warrant against the vouchers upon common recoveries had, in writs of entry and writs of right of advowson, were made for five returns inclusive;—for the more speedy perfecting of such recovery; it was enacted, that from and after the Feast of St. *Michael* the Archangel, 1752, all and every such writs of summons to warrant upon the appearance of the tenant to every such writ of entry and writ of entry and writ of advowson, should and might be made and abridged to four returns inclusive.

during the process of outlawry, and went abroad by way of covin at the time of the *exigent*, that should be replied;" and the case of *Plunkett* v. *Buchanan* (*a*), where a party seeking to reverse an outlawry, did not appear in person, but by attorney, the Court said, that it should be expressly stated in the affidavits, that the attorney was authorized by the party to make the application on his behalf,)—took time to consider.

Mr. Justice PARK now delivered the judgment of the Court as follows:—This case came before the Court upon a motion to set aside an annuity, for the reasons stated in the rule. The application was met by a preliminary objection at the bar, that the defendant cannot be heard, he being at this moment an outlaw, and that till the outlawry be set aside, he can no more make a motion of this description, than he could bring an action for any matter in which he might be interested. To this objection the Court are inclined to accede. I am, I admit, not aware of any case wherein this has been held upon a rule to shew cause; but when I find the rule to be so clearly established, that a man outlawed cannot maintain any action, (for, by his contumacy, he is out of the king's protection), and shall have no privilege or benefit from that law of which he is a violator, and to which he refuses to be amenable, I cannot conceive how he can set the law in motion by a rule to shew cause, to relieve himself from an inconvenience, any more than he can institute a suit for the recovery of his rights. It is true, an outlaw may be sued; for he shall not, by his own act, prejudice others. *Glanville* says (*b*), "*Utlagatus legem terræ amittit;*" and *Britton*, "*Respondra a touts, mes nul respondra a luy.*"

(*a*) 3 Barn. & Cres. 736; *S. C.* 5 Dow. & Ryl. 625.
(*b*) Lib. 2, c. 3.

1827.

LOUKES v. HOLBECHE.

To this point, we think the case of *Griffith* v. *Middleton* (*a*) no mean authority; for though that was a proceeding in *audita querela*, yet the opinion of Lord Chief Justice *Montague*, assisted by very eminent Judges, *viz.* Sir *John Croke*, Sir *John Doderidge*, and Sir *Robert Houghton*, decided, that a person outlawed is not receivable to sue in any Court, unless it be *to reverse his own outlawry;* for it was said, that, where it is *ad lucrandum*, there ought to be ability in the person: and it is all one to gain by way of *discharge*, as by way of *perquisition*. In this case, it is clear, that the application now made on the part of the defendant, is, that he may gain, by way of *discharge* from his annuity; which, according to those learned Judges, is the same as to gain by way of *perquisition*, that is, as by suit in an action. The case in *Mitford* must have been that of a relator only, and not a plaintiff and relator; for a mere relator cannot have outlawry pleaded against him (*b*). So, at the common law, though an outlaw may prosecute an information for the King, yet he cannot do so, if the effect be to procure a benefit not only for the King, but for himself also. This distinction was expressly taken in *Atkins* v. *Bayles* (*c*), where an information *qui tam* was exhibited against a Justice of Peace for refusing to grant his warrant to suppress a conventicle, and outlawry in disability of the plaintiff was pleaded, the Court held, that though the King were interested, yet the informer only was plaintiff, and entitled to the benefit; and that though he were disabled, yet he might sue for the King, but not for himself: and judgment was accordingly given, that the plea was good.—It has been pressed upon us, that a person never can reverse an outlawry, though he were beyond sea at the time of the *exigent*, if he had gone there by fraud and covin; and that there was

(*a*) Cro. Jac. 425. (*b*) See *Philips* v. *Gibbons*, 1 Ves. & Beam. 185.
(*c*) 2 Mod. 267.

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of *nonpros.* signed in this cause should not be stayed, *without costs.* The learned Serjeant relied on the case of *Lyttleton* v. *Cross* (*a*), where, in covenant against executors, they pleaded *plene administravit* and a retainer; and, at the trial, they pleaded a plea *puis darrein continuance,* to which the plaintiff replied, and the defendants demurred to the replication; and judgment was given for the defendants on the demurrer; it was held, that they were entitled to the costs incurred *after* the plea *puis darrein continuance,* but *not to the costs of the whole cause.* And, in *Willett* v. *Pringle* (*b*), it was held, that if an action be commenced against a bankrupt after the commission, for work done before the bankruptcy, and the bankrupt afterwards obtain his certificate, the defendant is discharged from the costs, as well as the debt.—And here, as the plaintiff had a good right of action from the time it was commenced to setting down the cause for trial, the defendant can only be entitled to those costs which were incurred after he put in his plea *puis darrein continuance.*

Mr. Serjeant *Taddy* now shewed cause on an affidavit, which stated, that, on the day special bail were put in for the defendant, *viz.* the 17th *May* last, his attornies, by letter, requested the plaintiff's attornies not to except to the bail, as the defendant had obtained his certificate, which would appear in the next *Gazette.* That no answer having been received, the certificate was shewn to the plaintiff's attornies on the 20th, signed by three of the Commissioners; and that the person producing it stated, that the allowance of the Lord Chancellor would be shortly obtained. That, notwithstanding this, the defendant was compelled, by the plaintiff's attornies proceeding in the action, to justify bail, and plead the general issue; after which they set the cause down for trial. That,

(*a*) 4 Barn. & Cres. 117; S. C. 6 Dowl. & Ryl. 81. (*b*) 2 New Rep. 190.

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shortly after the certificate was completed, *viz.* on the 26th *June*, a plea of the defendant's bankruptcy, and certificate *puis darrein continuance*, was delivered to the plaintiff's attornies. That the record was immediately withdrawn, and notice of trial countermanded. That a rule for the plaintiff to reply was entered with the Secondary; and that the plaintiff obtained time to reply, under a Judge's order, till the first day of this Term; and that judgment of *nonpros.* was afterwards signed, the defendant's costs taxed, and execution issued for the recovery thereof. The learned Serjeant contended, that, under these circumstances, the judgment of *nonpros.* had been regularly signed, and that the plaintiff was liable to the defendant's costs, as taxed by the Prothonotary. The case of *Lyttleton* v. *Cross* is altogether distinguishable, as, there, judgment was given for the defendants *on demurrer* to a replication to a plea *puis darrein continuance*, and their claim for costs depended on the statute 8 & 9 *Will.* 3, c. 11, s. 2, which enacts, that if judgment on demurrer is given for the defendant, he shall have judgment to recover his costs. That statute applies only to cases of demurrer and writs of error after judgment: and here, as the plaintiff had notice that the defendant had obtained his certificate, and which was shewn to the plaintiff's attornies; yet, as they afterwards set down the cause for trial, he must be liable for the costs of the *nonpros.* as taxed by the Prothonotary.

Mr. Serjeant *Wilde*, in support of his rule.—The defendant's certificate was a nullity till duly allowed by the Lord Chancellor. The action was properly commenced by the plaintiff, and his proceedings were altogether regular, till the plea *puis darrein continuance* was delivered, by which the defendant prayed judgment if the plaintiff ought *further* to prosecute his action against him. The defendant, therefore, can only be entitled to the costs in-

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STILL, Demandant; RAYMOND, Tenant.

writ of summons to warrant upon the appearance of the first vouchee, might be made returnable in eight days of *St. Hilary*, in *Hilary* Term last; the second writ of summons on the morrow of the *Purification* in that Term; and that the tenant's appearance might be recorded as of *Hilary* Term last, and that the recovery might pass as of that Term, notwithstanding the Commissioners, named in the *dedimus*, for taking the warrant of attorney of the first vouchee, had omitted to indorse the usual return on the writ, and notwithstanding the erasure in the jurat of the said affidavit. The learned Serjeant referred to the 9th section of the statute 24 *Geo.* 2 (*a*), and submitted, that the Court were justified in abridging the returns of the second writ of summons to three returns inclusive; and that, if not, the recovery as against Dr. *Law*, the second vouchee, would be a nullity; and although he had concurred by executing the deed to make the tenant to the *præcipe*, yet he was not a necessary party to the recovery, he being tenant for life only, and the first vouchee tenant in tail.

The Court observed, that the statute was merely directory, and that the returns might be abridged where the justice of the case required it.

The amendment was accordingly ordered to be made in the terms as prayed.

(*b*) By which it was provided and enacted, that in such and like cases and process, as special days had been used to be appointed and assigned, and given, for the return of writs and process, it should be lawful to the Justices of every the King's courts of record for the time being, in all the process by them awarded, to assign and appoint special days of returns, as by them should be thought convenient.

1827.

Saturday, Nov. 24th.

The defendant, an uncertificated bankrupt at the time of his arrest, put in bail and pleaded the general issue, and afterwards delivered a plea of his bankruptcy, and certificate *puis darrein continuance*, on which the plaintiff withdrew the record, and countermanded notice of trial, and the defendant, after rule to reply, signed judgment of *nonpros.*, and taxed his costs:—The Court ordered the proceedings on the judgment to be stayed, *without costs.*

BAKER *v.* MORREY.

A WRIT of *capias ad respondendum* was issued, at the suit of the plaintiff, against the defendant in this cause, returnable in fifteen days of *Easter*, in *Easter* Term last, under which the defendant was arrested, he being, at the time of issuing the writ, an uncertificated bankrupt. Special bail were put in on the 17th *May* last, to which an exception was entered; and, on the 22d, other bail were put in and justified. Issue was joined in the last *Easter* Term, and notice of trial given for the first Sitting in *Trinity* Term last, and was afterwards continued to the second Sitting in that Term; and the record was passed, and the cause then duly set down for trial. Immediately afterwards, the defendant's attornies delivered to the plaintiff's attornies, on the part of the defendant, a plea of bankruptcy, and certificate *puis darrein continuance*. On the 26th *June*, the notice of trial was countermanded, and the record withdrawn; and, shortly afterwards, the defendant's attornies served a rule on the plaintiff's attornies for the plaintiff to reply to the defendant's plea *puis darrein continuance;* on which the plaintiff's attornies obtained a Judge's order for time for the plaintiff to reply, until the first day of this Term, when the plaintiff determined not to proceed any further in the action. The defendant's attornies, since the commencement of this Term, signed judgment of *nonpros.* for want of a replication; and the defendant's costs thereon were taxed at 19*l.* 15*s.*; of which the plaintiff's attornies had notice; and they were afterwards apprised by letter that the defendant's attornies had issued execution against the plaintiff for the amount of such costs.

Mr. Serjeant *Wilde*, on a former day, on affidavits of the above facts, obtained a rule, calling on the defendant to shew cause why all the proceedings on the judgment

nett, nor can they be considered as his servants. All four were joint trespassers, and all were parties to the contract as to the sale of the printing press and apparatus required for the printing and publication of the newspaper. All the parties acquired a benefit by the sale, and were equally guilty of a trespass as against the plaintiff. Although, in *Hall* v. *Ody* (*a*), this Court held, that the costs of two actions between the same parties, though in two different Courts, might be set off against each other, notwithstanding the lien of the attorney for costs, yet the Court of *King's Bench* have laid down a different rule; and Lord *Eldon*, in *Hall* v. *Ody*, expressed his surprise as to the practice of this Court, *viz.* that the lien of the attorney was subject to the equitable claims of the parties. That case, however, is inapplicable to the present, as here the trespass was not committed by *Bennett* alone, nor did the three other defendants act under his command; and they were all equally responsible to the plaintiff for the damages recovered by him in that action.

Mr. Serjeant *Bosanquet*, in support of his rule, produced affidavits of two of the defendants, who stated that, at the time of the sale of the press, &c. to them by *Bennett*, he said that he was fully authorized to sell the copyright of the newspaper, as well as the printing materials. That they paid him a certain sum for them, and were put into immediate possession by *Bennett*. That, during the treaty, the plaintiff did not object to the sale; and that the defendants had understood that *Bennett* had made large advances to him, and that he (*Bennett*) had full authority to dispose of the materials. That they, in taking possession, acted entirely under his sanction and direction; and, from his representations, they relied that they were justified in the measures which they pursued; and that *Bennett* bound

(*a*) 2 Bos. & Pul. 28.

1827.

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himself in a penalty of 500*l.* to the three defendants, as purchasers, for the due performance of the agreement for the purchase. Under these circumstances, the learned Serjeant submitted, that *Bennett* alone was liable for the amount of the damages recovered by the plaintiff in the action of trespass, as the three other defendants acted under his direction, he considering that he was fully authorized to dispose of the printing-press and materials, as well as the copyright of the newspaper. According to the established practice of this Court, when two parties sue each other substantially in the same right, the damages and costs of one action may be set off against those in the other, notwithstanding the lien of the attorney for his costs. Here *Bennett* was substantially the only party in both actions, as the three other defendants acted under his authority in committing the trespass complained of; and, if the plaintiff had brought the action against him alone, he would equally have been entitled to recover to the extent of the damage he had sustained.

Mr. Justice PARK.—I am clearly of opinion, that this rule must be made absolute. I at first felt a difficulty as to the attorney's right of lien, and wish that the rule, that it is subject to the equitable claims of the parties, was not so inveterate. But we are bound to act on the authority of *Hall* v. *Ody*, although the practice of the two Courts may shortly be assimilated in this respect. It appears, from the affidavits of the defendants, that *Bennett* alone was the substantial party in the action of trespass brought against them; and, if so, there can be no doubt but that he is entitled to set off the amount of the damages in the action brought by him against the plaintiff, against the amount of the damages found for the latter in this action, which was brought by him against *Bennett* and the three other defendants, who acted under his authority.

Rule absolute.

curred after the plea, which, in point of fact, amount to nothing.

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Per Curiam.—The only question is, whether the plaintiff has made the proper application to *stay* the proceeding son the judgment of *nonpros., without costs.* It is quite clear that the defendant cannot be entitled to any costs incurred previously to his putting in his plea of *puis darrein continuance;* and it is but seldom that a plaintiff takes any further steps after such a plea has been delivered.

Rule absolute.

BOURNE *v.* BENNETT and Three Others.

Saturday, Nov. 24th.

THE defendant *Bennett* having made large advances to the plaintiff, for the purpose of printing and publishing a weekly newspaper, and purchased the printing press and other necessary apparatus for carrying on the business, the plaintiff promised, in writing, that if he could not succeed in obtaining further advances from his friends, he would decline publishing the paper, and give up the press and types which belonged to the defendant *Bennett,* to him: and not being able to procure such advances, *Bennett* disposed of the printing press and types, as well as of the copyright of the newspaper, to the three other defendants, who took possession of them accordingly. The plaintiff afterwards commenced the present action (trespass) against the above defendants for taking possession of the press and types. *Bennett* thereupon sued out a commission of bankrupt against the plaintiff; and, on his being declared bankrupt, the defendants pleaded his bankruptcy *puis darrein continuance.* The commission was afterwards superseded, when the defendants applied to the Court to with-

Where an action had been brought, and damages recovered by the defendant against the plaintiff, and another action had been brought, and damages recovered by the plaintiff against the defendant and three others for a trespass, in which latter action, the defendant, who was the plaintiff in the former action, was the only substantial defendant (he having indemnified the other three);—the Court allowed the damages and costs in the first action to be set off against the damages and costs in the second.

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draw the plea of bankruptcy, and plead the general issue, which was refused. They then suffered judgment by default, and a writ of inquiry was executed; and the Jury assessed the plaintiff's damages at 300*l.* Before the execution of that writ, the defendant *Bennett* commenced an action in the Court of *King's Bench* against the plaintiff for the monies advanced to him; and on the cause coming on for trial, he gave *Bennett* a *cognovit*, by which he acknowledged himself to be indebted to him in the sum of 700*l.* On the sale of the types and press by *Bennett* to the three other defendants, he bound himself in the penalty of 500*l.* to them for the due performance of his agreement with them for the sale of the property; and consequently alleged that he was solely liable for, and must ultimately discharge the said sum of 300*l.*, and the costs of the action of trespass. On an affidavit of these facts by the defendant *Bennett*—

Mr. Serjeant *Bosanquet*, on a former day in this Term, obtained a rule, calling on the plaintiff to shew cause, why all further proceedings in this action should not be stayed, and why the defendant *Bennett* should not be at liberty to set off the 700*l.*, the amount of the damages confessed in the action brought by him against the plaintiff, against the 300*l.*, being the amount of the damages recovered by the plaintiff in this action, upon satisfaction being entered on the judgment in the action of *Bennett* v. *Bourne*, for the amount of the damages and costs in this action.

Mr. Serjeant *Wilde* now shewed cause.—The plaintiff having recovered a verdict in the action of trespass against four defendants, one cannot make an application to set off the damages in an action brought by him against the plaintiff, for a debt due to him alone. One of several co-trespassers cannot be indemnified by another; and here the three defendants did not act under the direction of *Ben-*

1827.

Monday, Nov. 26th.

ROSSET and Another *v.* KING.

The Court refused to allow the defendant, in an action of *assumpsit*, to plead the general issue; and also several special pleas, that the money mentioned in the declaration was due only for differences arising out of stock-jobbing transactions; as such matter might be given in evidence under the former plea.

THIS was an action of *assumpsit*. The declaration contained counts for work and labour, the common money counts, and an account stated. By a Judge's order, a summons for the delivery of a further and better account, in *writing*, of the particulars of the plaintiffs' demand in this cause, was discharged, on their undertaking to confine their case to evidence of an account stated.

Mr. Serjeant *Wilde*, on a former day, obtained a rule, calling on the plaintiffs to shew cause why the defendant should not have leave to plead several matters, *viz.*:— *First, Non Assumpsit; Secondly*, to the last count (the account stated), that the money therein mentioned was due only for differences arising out of stock-jobbing transactions; *thirdly, fourthly, fifthly, sixthly*, and *seventhly*, to the last count, of the same nature as the *second* plea, but on other stock-jobbing transactions; *eighthly, ninthly, tenthly*, and *eleventhly*, to the last count, of the same nature as the *second* plea, with the exception that the money was due from the defendant to the plaintiffs for differences paid by the latter as agents in stock-jobbing transactions.

Mr. Serjeant *Taddy* now shewed cause, and submitted, that any thing which went to destroy or impeach the contract, might be given in evidence under the general issue; and he relied on the case of *Shaw* v. *Everett* (*a*), where, to *assumpsit* on a bill of exchange, the Court would not allow the defendant to plead the general issue, and that the bill was given on a stock-jobbing transaction, contrary to the statute 7 *Geo. 2*, c. 8.

(*a*) 1 Bos. & Pul. 222.

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ROSSETT v. KING.

Mr. Serjeant *Wilde*, in support of the rule, insisted, that it was necessary for the defendant to state, in his pleas, the different stock-jobbing transactions on which the plaintiff's claims were founded. There were, in point of fact, nine different contracts, and the object of pleading them separately was to avoid a variance.

Mr. Justice PARK.—It is difficult to determine what pleas amount to the general issue; but I am clearly of opinion, that the pleas now sought to be pleaded ought not to be placed on the record; for, if the different contracts be void by statute, the defendant may give in evidence under the general issue any facts which prove them so.

Mr. Justice BURROUGH.—There might be five hundred distinct contracts; and any thing which goes to impeach them may be given in evidence under the general issue.

Mr. Justice GASELEE.—I am of the same opinion. There are numerous cases where it is of great benefit to put special pleas on the record, as it tends to save considerable expense to parties. Here, it is said, there are nine different transactions; but there is no pretenee for saying, that the plaintiffs are not fully apprised of the nature of the defence intended to be set up, as they rest their case on the account stated. Although it is frequently beneficial to plead specially, yet, in this particular instance, there is no colour for so doing.

Rule discharged.

1827.

IN THE EXCHEQUER CHAMBER.

MACDOUGALL, Gent. One, &c., *v.* ROBERTSON and Another. [In Error.]

Tuesday, Nov. 27th.

THIS was an action of debt on a surety-bond, in the penal sum of 1000*l.* The defendant below craved oyer of the bond and condition, which were set out; by which latter,—after reciting, that, by a certain deed of submission, or instrument, in writing, in the *Scotch* form, and signed by *Æneas Morrison*, at *Glasgow*, on the —— day of *June*, 1826, and by the plaintiffs below, and made, or expressed to be made, between *Morrison*, of the first part, and the plaintiffs below, of the second part, it was witnessed, that the said parties did thereby submit and refer to the amicable decision, final sentence, and decreet arbitral of two arbiters, mutually named by the said parties, or, in case of the said arbiters' differing in opinion, to any umpire or oversman, whom they should appoint, all claims, demands, disputes, and differences, being and subsisting between the said parties, or in any respect competent to *Morrison* against the plaintiffs below, or either of them, or competent to them or either of them against *Morrison*, with power to the arbiters to name their own clerk, and award his fees and expenses; to pronounce interim orders, decreets, and certifications; to prorogate the submission from time to time; and, in general, to do every thing which the arbiters or oversman should judge necessary, for bringing the matters submitted to a just and speedy issue; and that what-

By a deed of submission to arbitration, it was provided, that the submission should not vacate or expire through the decease or insolvency of either of the parties, but should, notwithstanding such an event, be proceeded in, and the matters at issue determined, in the same manner as if such an event had not occurred; and the parties bound themselves, their heirs, executors, and successors, to abide by the award. The arbitrator, by his award, directed the *executors* of one of the parties (who had died before the award made) to pay a certain sum to the other; and they having no assets, the party in whose favour the award was made, sued the surety on a bond conditioned for the due performance of the award by the principal, his heirs, &c.; in which bond the clause as to the death was not inserted:—Held, that the authority of the arbitrator was not determined by the death; and the surety having pleaded performance of the award, according to the covenants contained in the *said* deed of submission, which deed was set out in a former plea:—Held, that the two pleas might be taken together, there being an express reference in the one to the other. By a deed of submission in the *Scottish* form, an award was to be made betwixt and the day of next, or any other day to which the submission might be prorogated:—Held, that the absence of date was immaterial, as it was equivalent to a general authority, to be executed within a reasonable time.

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MACDOUGALL v. ROBERTSON.

ever the arbiters or oversman should give forth and pronounce as their decreet or decreets arbitral in the premises, interim or final, partial or total, to be given forth and pronounced by them anent the matters submitted to their consideration, betwixt the times in the submission mentioned, or any other day to which the submission might be prorogated, or should deem, determine, or ordain, to be paid, done, or performed by either of the said parties to the other, they, by the said deed of submission then in recital, bound and obliged themselves respectively, their heirs, executors, and successors, to abide by, fulfil, and perform to each other, under the penalty of 500*l.* sterling, to be paid by the party failing to the party observing, or willing to observe the same, over and above performance; and in the said deed of submission were contained such other provisoes, declarations, and agreements, as were therein more particularly specified and set forth; and that previously to the execution of the deed of submission, it was stipulated and agreed, that the defendant below, as a surety for *Morrison*, should enter into and give unto the plaintiffs below a bond, in the penal sum of 1000*l.*,—it was conditioned, that, if *Morrison*, his heirs, executors, administrators, and successors, did and should well and truly observe, perform, fulfil, and keep all and every the covenants, clauses, provisoes, declarations, consents, and agreements whatsoever, specified and contained in the said in part recited deed or instrument of submission, which, on the parts and behalves of *Morrison*, his heirs, executors, administrators, and successors, were, and ought to be, observed, performed, fulfilled, and kept, according to the true intent and meaning of the same deed or instrument of submission; and particularly if *Morrison*, his heirs, executors, administrators, and successors, did and should well and truly pay, or cause to be paid, to the plaintiffs below, or either of them, their, or either of their, executors, administrators, and suc-

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cessors, all such sum and sums of money (if any) in the nature of a penalty or otherwise, which should become payable by *Morrison*, his heirs, executors, administrators, or successors, under or by virtue of the said deed or instrument of submission, by reason of the breach, non-observance, or non-performance of any decreet or decreets arbitral in the premises, interim or final, partial or total, to be given forth and pronounced by the said arbiters, or their umpire or oversman, by virtue of the said deed of submission; and also, if *Morrison*, his heirs, executors, administrators, and successors, did and should, in all things, well and truly stand to, obey, and abide by, observe, perform, fulfil, and keep, as well all and singular the interim orders, decreets, and certifications, as also the final award, order, abitrament, sentence, decreet arbitral, final end, and determination, to be given forth, pronounced, and made, by the said arbiters, or by the umpirage of their umpire or oversman, under or by virtue of the said deed of submission; then the obligation was to be void, otherwise, to remain in full force and virtue. The defendant then pleaded,—*First, non est factum.*

Secondly, "that, by the deed of submission, in the condition of the bond mentioned, it was witnessed, that the parties thereto had submitted and referred to the amicable decision, &c. of two arbiters, or, in case of their differing in opinion, to any umpire or oversman whom they should appoint, all claims, demands, &c. &c. (as in the bond) with power to the arbiters to name their clerk, and award his fees and expenses, to pronounce interim orders, &c., to prorogate the submission, &c., and that whatever the said arbiters or oversman should give forth and pronounce as their decreet or decreets arbitral in the premises, interim or final, partial or total, to be given forth and pronounced by them, anent the matters submitted to their consideration, betwixt and the day of next to come, or any other day to which the submission might be prorogated, and should deem, determine, or ordain to be paid, done,

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or performed, by either of the parties, to the other, they thereby bound and obliged themselves respectively, and their heirs, executors, and successors, to abide by, fulfil, and perform, to each other, under the penalty of five hundred pounds, to be paid, by the party failing, to the party observing, or willing to observe, the same, over and above performance: declaring always, as it was thereby expressly provided and declared, that the said submission *should not vacate or expire through the decease or insolvency of either of the parties, but should, notwithstanding of such an event, be proceeded in, and the matters at issue determined, in the same manner as if such an event had not occurred;* And, as to all of the said condition of the said writing obligatory, except the part thereof which related to the standing to, obeying, abiding by, observing, performing, fulfilling, and keeping the final award, order, arbitrament, sentence, decreet arbitral, final end, and determination, to be given forth, pronounced, or made by the arbiters, or umpirage of their umpire or oversman, under or by virtue of the deed of submission, that *Morrison*, in his life-time, and his heirs, executors, administrators, and successors, since his death, did well and truly observe, perform, fulfil, and keep, all and every the covenants, clauses, provisoes, declarations, consents, and agreements whatsoever, specified and contained in the said deed or instrument of submission, which, on their parts and behalves, were or ought to be observed, performed, fulfilled, and kept, and paid, or caused to be paid, to the plaintiffs below, all such sum and sums as the arbiters, or their umpire or oversman, by any interim order or decreet, awarded, ordered, decreed, or directed to be paid, or which became payable by *Morrison*, his heirs, executors, &c., or which became due or payable under or by virtue of the said deed of submission, by reason of the breach, non-observance, or non-performance of any interim decreet or decreets arbitral, in the premises, given forth or pronounced by the arbiters, or their umpire,

according to the true intent and meaning of the deed of submission, and the force and effect of the condition of the said writing obligatory, in that behalf; and, as to the residue of the said condition, that the said arbiters did not give forth or pronounce any *final award*, order, arbitrament, sentence, decreet, final end, or determination, nor did their umpire or oversman give forth, pronounce, or make any final umpirage, under or by virtue of the deed of submission."

Thirdly.—As to all the condition of the said writing obligatory, except the part thereof which relates to the payment of all such sum or sums as the arbiters or their umpire should award, order, or direct to be paid by *Morrison, his heirs, &c.* to the plaintiffs below, their executors, *&c., and also* such other sum and sums, in the nature of a penalty or otherwise, which should become payable by *Morrison*, his heirs, &c., under or by virtue of the said deed of submission, by reason of the breach or non-performance of any decreet or decreets arbitral in the premises, interim or final, partial or total, to be given forth and pronounced by the said arbiters, or their umpire or oversman, and the standing to, obeying, &c. &c., as well all and singular the interim orders, decreets, &c., as also the final award, order, arbitrament, &c. &c., to be given forth, pronounced, and made, by the said arbiters, or by the umpirage of their umpire,—the defendant below pleaded, "that *Morrison*, in his life-time, and his heirs, executors, administrators, and successors, after his death, well and truly observed, performed, fulfilled, and kept, all and every the covenants, clauses, provisoes, &c. &c. specified and contained in the deed of submission, which, on the part of *Morrison*, his heirs, &c., were and ought to be observed, performed, fulfilled, and kept, according to the true intent and meaning of the same deed, except as last aforesaid." And, as to the said part of the said condition so excepted as last aforesaid, "that the arbiters did not, nor did their umpire, award, order, or direct, any sum or sums to be paid by *Morrison*, his heirs, &c., to

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the plaintiffs, or their executors, &c., nor did any sum or sums, in the nature of a penalty, or otherwise, become payable by *Morrison*, his heirs, &c., under or by virtue of the said deed of submission, by reason of the breach, or non-performance, of any decreet or decreets arbitral, in the premises, interim or final, partial or total, pronounced by the arbiters, or their umpire or oversman; and that the said arbiters did not give forth, pronounce, or make, any interim order, decreet, and certification, or final award, order, arbitrament, sentence, decreet arbitral, final end, or determination; nor did their umpire or oversman give forth, pronounce, or make, any umpirage under or by virtue of the deed of submission."

Fourthly.—As to all the condition of the said writing obligatory, except the part thereof which is excepted in the introduction to the *first* (*a*) plea; "that *Morrison*, in his life-time, and his heirs, executors, administrators, and successors, since his death, did well and truly observe, perform, fulfil, and keep, all and every the covenants, clauses, provisoes, declarations, consents and agreements whatsoever, specified and contained in the said deed or instrument of submission, which, on their parts, were and ought to be observed, performed, fulfilled, and kept, and paid, or caused to be paid, to the plaintiffs below, all such sum and sums as the said arbiters, or their umpire, by any interim order, or decreet, awarded, decreed, or ordained to be paid, or which became payable by *Morrison*, his heirs, executors, &c., or which became due or payable under or by virtue of the deed of submission, by reason of the breach, non-observance, or non-performance, of any interim decreet or decreets arbitral, in the premises, given forth or pronounced by the arbiters or their umpire;" and, as to the said part of the said condition, which is excepted in the in-

(*a*) This was treated by the Court as a mere clerical error, it evidently being intended for the *second* plea, and though mentioned in the argument, it was not urged as an objection.

troduction to the said *first* plea, "that, after the making of the said deed of submission in the condition mentioned, and after the making of the said writing obligatory and condition, and before the arbiters gave forth, pronounced, or made, any final award, order, &c. &c., and before the umpire gave forth, pronounced, or made, any umpirage under or by virtue of the said deed of submission, to wit, on the 7th *October*, 1823, *Morrison* died, to wit, at &c."

Fifthly.—As to all the condition of the said writing obligatory, except the part thereof which is excepted in the *second* plea, "that *Morrison*, in his life-time, and his heirs, executors, administrators, and successors, after his death, well and truly observed, performed, fulfilled, and kept, all and every the clauses, covenants, provisoes, declarations, consents, and agreements whatsoever, specified and contained in the said deed or instrument of submission, which, on their parts, were and ought to be observed, performed, fulfilled, and kept, according to the true intent and meaning of the same deed, except as last aforesaid;" and, as to the part excepted in the introduction of the said *second* plea, "that, after the making of the deed of submission, and the bond and condition, and before the arbiters, or their umpire or oversman, awarded, ordered, or directed, any sum or sums of money to be paid by *Morrison*, his heirs, executors, administrators, or successors, and before they gave forth or pronounced any decreet or decreets arbitral, in the premises, interim or final, partial or total, and before they, or their umpire or oversman, pronounced any final award or umpirage by virtue of the said deed of submission, to wit, on &c., *Morrison* died."

Sixthly.—As to so much of the condition as relates as well to the standing to, abiding by, and keeping, all the interim orders, as also the final award by the arbiters or umpire, "that neither of them gave forth, pronounced, or made, any interim order, or any final award, under or by virtue of the deed of submission."

Seventhly.—"That, at the time of making the bond, the

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defendant below had not seen, nor had he any notice, nor was he informed of, nor acquainted with, the terms and contents of the deed of submission in the condition mentioned; and that the deed contained unusual clauses, covenants, or provisions."

Eighthly.—" That the deed contained illegal clauses and provisions:"—and—

Lastly.—" That the bond was obtained, from the defendant in error, by fraud and covin."

The plaintiffs below joined issue on the *first*, *seventh*, *eighth*, and *last* pleas; and, as to the *second* and *third*,—after protesting, that *Morrison*, in his life-time, and his heirs, &c. after his death, did not well and truly observe, perform, and keep, all and every the covenants, &c. specified and contained in the deed of submission, which, on their parts and behalves, ought to have been observed, &c.; protesting also, that *Morrison*, in his life-time, and his heirs, &c. since his death, did not pay to the plaintiffs below all such sum and sums as the said arbiters, or their umpire, by any interim order or decreet, awarded and directed to be paid, or which became payable by *Morrison*, his heirs, &c.:—for replication, nevertheless, in that behalf, the plaintiffs below said, "that, after the making of the deed of submission and bond, and in the life-time of *Morrison*, the arbiters accepted the submission, and appointed their clerk;—that they afterwards appointed *R. F.* to be sole oversman;—that, *after the death* of *Morrison*, the arbiters, having differed in opinion, submitted the whole matters referred to them to the sole determination of *R. F.*, as oversman, who accepted the office, and, after prorogating the matters submitted, made his final sentence and decreet arbitral in the premises, whereby he found (among other things) that the estate of *Morrison* was indebted to the plaintiffs below in the sum of 1505*l.* 11*s.* sterling, of principal, and 95*l.* 10*s.* 6*d.* for interest due thereon, which sums he decerned and ordained the *executors* of *Morrison* to pay to the plaintiffs

below, reserving to them the lawful benefit of any objection arising from the insufficiency of the funds, realized from the deceased *Morrison's* estate, for the full payment of his just and lawful debts;—that the *executors* of *Morrison* were bound to deliver up to the plaintiffs below a letter of credit, granted by two persons in *London*, at the request of the plaintiffs below, in favour of *Morrison*, and authorizing him to draw upon those persons for 500*l.*; and that the oversman accordingly decerned and ordained the *executors* of *Morrison* to deliver up the said letter of credit to the plaintiffs below, free from any lien or claim on the part of any third party; and, failing the executors delivering up the letter, he decerned and ordained them, not only to make payment to the plaintiffs below of the said sum of 500*l.* and interest, but also to free and relieve the plaintiffs below of the whole costs, damages, and expences, which they might in any manner sustain, directly or indirectly, in and through the proceedings which might be directed by any person or persons against those persons, under the letter of credit." The plaintiffs below then averred, "that the executors of *Morrison*, and the defendant below, had notice of the final sentence and decreet arbitral of the oversman; which was afterwards duly registered;— that all the proceedings under the submission were and are *regular and valid, and according to the law of Scotland*, where the same were had; and that the decreet arbitral was and is a good and standing award under the submission;" and assigned for breaches—*First*, "that the executors of *Morrison* did not, nor would, pay to the plaintiffs below the said principal sum of 1505*l.* 11*s.*, and 95*l.* 10*s.* 6*d.* interest, or any or either of them, since the final sentence and decreet arbitral in that behalf mentioned, although the plaintiffs below were ready and willing, and offered, to perform their part of the final sentence and decreet arbitral, and to relieve *Morrison's* estate, as in the said final sentence and decreet arbitral was mentioned, &c.

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Secondly, that *Morrison's* executors did not nor would (although required) deliver up to the plaintiffs below the said letter of credit, on the terms mentioned in the award. And, *lastly*, that the said executors did not nor would, although they had failed to deliver up the said letter of credit, pay the plaintiffs below the said sum of 500*l.*, for which such letter was granted, as ordained by the said final sentence or decreet arbitral.—Of all which several premises, the defendant below had notice."

The plaintiffs below then demurred specially to the *fourth* plea, and assigned for causes:—*First*, "that, in and by the deed or instrument of submission, in the condition of the bond, and *fourth* plea, mentioned and referred to, it was (among other things) expressly provided and declared, *that the submission should not vacate or expire through the decease of either of the parties, but should, notwithstanding of such an event, be proceeded in, and the matters at issue determined, in the same manner as if such an event had not occurred;* yet, that the defendant below, had, in his said *fourth* plea in bar of the action of the plaintiffs below, alleged that *Morrison* died before the making of any final award or umpirage, order, &c. &c., under or by virtue of the said deed of submission, without having shewn that the submission was proceeded in, and the matters at issue determined, according to the said proviso, after the decease of *Morrison*, or alleged any reason or excuse in that behalf, although the bond of the defendant below was conditioned, as aforesaid, among other things, for the performance, in manner aforesaid, of all the provisoes specified and contained in the said deed of submission." *Secondly*, "that the defendant below, in his said *fourth* plea in bar of the said action of the plaintiffs below, alleged that *Morrison* died before the making of any such final award or umpirage, order, &c. &c., as last aforesaid; without shewing, either that such was not made after the decease of *Morrison*, or that, if such were so made, it was

performed by the heirs, executors, administrators, or successors, of *Morrison*, or any of them; although the bond of the defendant below was conditioned (among other things) for the performance of such final award or umpirage, order, &c. &c., by *Morrison*, his heirs, executors, administrators, and successors." *Thirdly*, "that the defendant below had, in and by his said *fourth* plea, attempted to put in issue an immaterial fact, to wit, the death of *Morrison*." And, *lastly*, "that the plea was evasive, and argumentative, and, in other respects, uncertain, insufficient, and informal, &c.

There was also a demurrer to the *fifth* plea, which was similar in terms to the above: as well as to the *sixth*, which, it was admitted, at the outset of the argument, could not be sustained.

As to the replication to the *second* and *third* pleas, after protesting that the replication, and matters therein contained, were wholly insufficient in law; protesting also that the said supposed final sentence and decreet arbitral was not nor is a good and standing award under the submission, but was and is a void and invalid award, and made after the revocation of the submission by the death of *Morrison*, and made by a delegated authority, and not under the submission, and void in various other respects;—for rejoinder, nevertheless, as to so much of the replication as related to the supposed breach of the said supposed final sentence, decreet arbitral, or award, *first* above assigned, the defendant below said, "that *Morrison* died wholly insolvent, and without leaving any estate, effects, funds, goods, or chattels, applicable to the payment and discharge of the said two several sums of 1505*l.* 11*s.* and 95*l.* 10*s.* 6*d.*, in that breach mentioned, or either of them;—and that the executors of *Morrison* had not, nor had any of them, at the time of making the said final sentence, &c., or at any time before or since, hitherto, nor had they, nor had any of them, at the

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time of the commencement of this suit, or at any time since, hitherto, nor have they, nor has any of them, now, any estate, effects, &c. &c. which were of *Morrison* deceased, at the time of his death, in their hands, to be administered. Wherefore, as to so much of the replication to the *second* and *third* pleas as related to the supposed breach of the said supposed final sentence, &c. first above assigned, the defendant below prayed judgment, if the plaintiffs below ought to have or maintain their aforesaid action thereof against him, &c." And, as to so much of the replication as related to the supposed breach *secondly* above assigned, the defendant below averred, "that the executors of *Morrison* did deliver up to the plaintiffs below the said letter of credit, as in that breach mentioned; on which an issue was tendered." And, as to so much of the replication as related to the supposed breach of the said final sentence, &c. *lastly* above assigned, "that *Morrison* died wholly insolvent, and without leaving any estate or effects applicable to the payment or discharge of the said sum of 500*l.*, as in the said last breach mentioned; and that *Morrison's* executors had not, at the time of making the said final sentence, or since, any estate or effects of his, in their hands, to be administered."

And, as to the replication to the *seventh*, *eighth*, and *last* pleas, the defendant below joined issue, and joined in demurrer to the *fourth*, *fifth*, and *sixth*. The plaintiffs below joined issue on the rejoinder, as to so much of the replication as related to the breach of the award *secondly* assigned; and as to the rejoinder, as to so much of the replication as related to the *first* and *last* breaches of the award, they demurred specially, and assigned for causes,—"that, in and by the deed of submission in the condition of the bond and *second* plea of the defendant below mentioned, it was (among other things) expressly provided and declared, *that the submission should not vacate or expire through the insolvency of either of the parties, but should notwithstanding of*

such an event, be proceeded in, and the matters at issue determined, in the same manner as if such an event had not occurred; yet, that the defendant below had, in his rejoinder, inconsistently pleaded the insolvency of *Morrison*, deceased, as an excuse for the respective breaches of the said final sentence, and decreet arbitral, or award, *first* and *lastly* above assigned; although the said final sentence and award was duly made as aforesaid, under and by virtue of the said submission, and was, by the protestation of the defendant below, in his rejoinder, in effect, admitted to have been so made:—that the bond was (among other things) conditioned, absolutely and without reservation, for the full performance, by *Morrison*, his heirs, &c. of such final sentence, &c. or award, as should be made, as aforesaid, and particularly for the payment by them to the plaintiffs below, their executors, &c., of such sum or sums as should be awarded as aforesaid: yet, that the defendant below, in his rejoinder, had inconsistently pleaded the insolvency of *Morrison*, deceased, and the want of funds in the hands of his executors, as an excuse for the said respective breaches of the said final sentence, &c. or award, *first* and *lastly* above assigned; that is to say, the non-payment of the said sums of money so actually awarded to be paid to the plaintiffs below as aforesaid; and that the defendant below had, in his rejoinder to so much of the replication of the plaintiff below as related to the said breaches, *first* and *lastly* above assigned, attempted to put in issue one of two immaterial facts, to wit, the insolvency of *Morrison*, deceased, at the time of his death, or the want of funds in the hands of his executors."

The defendant below joined in demurrer; and, judgment having been given for the plaintiff below, upon the *fourth*, *fifth*, and *sixth*, pleas, (*a*) and upon the rejoinder to so much of the replication as related to the breaches of the final sentence and decreet arbitral, or award, *first* and *lastly* assigned,—

(*a*) The defendant below suffered judgment by default as to the pleas on which issues were joined.

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the defendant below brought a writ of error, and assigned general errors.

The points stated for argument, were as follow:—

First, that the award was void, it having been made after the death of *Morrison*, the principal; and that, by such death, the power to arbitrate was gone, notwithstanding the special clause in the deed of submission.

Secondly, That the award was void, it appearing, on the face of it, that the arbiter had delegated his authority.

Thirdly, that the award was void, for uncertainty, certain blanks being left therein.

Fourthly, that, supposing the award not to be void on account of all or any of the above objections, yet, that there had been no breach of the condition of the bond, it being conditioned that *Morrison*, the principal, or his heirs, &c., should pay such sum or sums of money as the arbitrator should direct; and he has directed that the *executors* should pay the sums awarded, not personally, but out of the estate of *Morrison* deceased.

The cause now came on for argument.

Mr. *Brodrick* for the plaintiffs in error.—Two questions are raised by the pleadings: the one on the demurrers to the *fourth* and *fifth* pleas; the other on the replication, as far as it relates to the *second* and *third*. These questions are distinct in themselves, and each set of the pleadings must be taken separately; for it is a well known and established rule of pleading, that one plea cannot be used in aid of another, unless expressly referred to by an appropriate allegation. The *fourth* and *fifth* pleas must therefore be looked at as if the *second* and *third* had not been pleaded. There is no clause in the *condition of the bond* by which it appears that the submission is not to be vacated by the death of either of the parties. It is true, there is a reference to the submission, and to certain provisoes and covenants therein specified and contained; but the *fourth* and *fifth* pleas only refer to the

exception in the introductory part of the *second* plea mentioned, and consequently do not incorporate the clause, by which the submission is not to vacate by the death or insolvency of either of the parties. The question on those pleas, therefore, is, whether the plaintiff in error, as the obligor in a surety bond, be or be not discharged from his obligation, by the death of his principal previously to the award being made. If the plaintiffs below had meant to avail themselves of the clause in the submission, they should have set it out in their replication; but, by demurring, they have given the plaintiff in error an opportunity of arguing the dry question of law, whether the authority of an arbitrator be not determined by the death of one of the parties referring before award made, without being fettered by such clause. They have admitted that *Morrison* died before the award was made; and the whole of the deed of submission was not set out on oyer of the condition of the bond, so as to incorporate it with the *fourth* and *fifth* pleas. It may be laid down as a general proposition, that the death of either of the parties submitting to arbitration, operates as a revocation of the power of the arbitrator, and vacates the submission, if such death take place before the award is delivered, and there be no clause in the submission to provide against it. In *Vynior's* case (*a*), it was expressly determined that a submission to an arbitration might be revoked, on the ground that a person cannot, by his own act, make an authority not countermandable, which is by law, and of its own nature, countermandable; and in *Milne* v. *Gratrix* (*b*), where parties by bond agreed to submit matters in difference between them to arbitration, and that the submission should be made a rule of Court, it was held to be competent to either to revoke his submission by deed, and that he could not be attached for contempt in not obeying the award, if made *after* such revocation, although the submission be afterwards made a rule of Court.

(*a*) 8 Rep. 82 a. (*b*) 7 East, 608.

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There, however, the authority of the arbitrator was revoked by the act of the party, whilst here it was by the act of God. In *Blundell* v. *Brettargh* (*a*), there was a contract for the sale of an estate, by which the parties contracted, for themselves, their *heirs*, executors, administrators, and assigns, that the value to be paid for it should be ascertained by the award of arbitrators, to be made within a certain time, or if they should not agree to make their award within that time, an umpire was to fix the value by a certain day; and one of the parties died before the award was made,—a Court of equity refused to decree a specific performance of the contract; and Lord *Eldon* there, after particularly adverting to the word *heirs*, as being introduced in the contract, said (*b*), "the question is, whether there is any contract, the terms of which were ascertained during the lives of these parties; that is, an agreement between them, that will bind those who are entitled after their deaths; or, whether this is not an agreement to sell at a price to be fixed by an award or umpirage, at such a price as they, the arbitrators or umpire, should, within a given time, during the lives of the parties, appoint; and no agreement, if neither the arbitrators nor the umpire fixed the price. Such an agreement cannot be carried into execution, if it has failed by the death of one of the parties; which cannot be considered as an accident against which this Court would relieve." In *Toussaint* v. *Hartop* (*c*), where a verdict was taken for the plaintiff, by consent, subject to an award, and the reference was authorised by an order of *Nisi Prius*, and the defendant died after verdict, but before award, and the arbitrator, after the death, made his award,—the Court held it to be bad, as the defendant's death was a revocation of the arbitrator's authority. So, in *Cooper* v. *Johnson* (*d*), where a cause was referred to an

(*a*) 17 Ves. 232.
(*b*) Id. 240.
(*c*) 1 B. Moore, 287; *S. C.* 7 Taunt. 571.
(*d*) 2 Barn. & Ald. 394.

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arbitrator by order of *Nisi Prius*, it was held that his authority was determined by the death of either party before the making of the award. It may be said, however, that admitting that the authority of the umpire or oversman, in this case, was determined by the death of *Morrison*, still, that it does not follow that the obligor on the bond is not bound, as he thereby undertook to abide by the award at all events. In *Vynior's* case the action was debt on bond, and although it was there resolved (*a*), that by the countermand or revocation of the power of the arbitrator, the obligee should take the benefit of the bond, and that for two reasons; *first*, because *the obligor* had broken the words of the condition, which were that he should stand to and abide the rule, order, and award; and *secondly*, because he had, *by his own act*, made the condition of the bond impossible to be performed; and, therefore, his bond was become single, and without the benefit or help of any condition, because he had disabled himself to perform the condition: yet, there the revocation was by the personal act of the obligor; but here, as the submission was vacated by the death of the party referring, his executors could not be bound by an award made afterwards, and much less can a mere surety. The death of *Morrison* before the award rendered it null and void; and his executors were only bound to observe the covenants he was bound to perform; for if they had paid the sums awarded, they would have done so in their own wrong, as they were not liable by law to pay. If an arbitrator delegate his authority to another, and die, the latter cannot afterwards proceed with the award. So, if *Morrison* had been released from the submission before his death, and the arbitrators had proceeded to make an award afterwards, his executors could not be bound by it; and a surety can only be liable where the representatives of his principal may be compelled to performance. In the

(*a*) Third resolution, 8 Rep. 82 b.

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construction of a surety-bond, the strict terms of the contract must be adhered to, and the party ought not to be bound beyond the scope of his engagement, according to the case of Lord *Arlington* v. *Merricke* (*a*), and the authorities there cited, and which have since been acted on in *Weston* v. *Barton* (*b*).

The *second* question involves a more difficult proposition, and arises on the demurrer to the rejoinder to the replication to the *second* and *third* pleas. The whole of the proceedings under the submission are set out in the replication, and the deed is set out in terms in the *second* plea, in which the clause or proviso, that the submission shall not be vacated by the death or insolvency of either of the parties, is contained. This raises an important question, and there is no case applicable to it, as the main distinction is, where the submission is revoked by the act of the party, or by the act of God. The cases of *Tyler* v. *Jones* (*c*), and *Clarke* v. *Crofts* (*d*), are altogether distinguishable. It is quite clear, that where a party constitutes an arbitrator by his own act, the authority of such arbitrator cannot be extended beyond the death of such party; and although clauses were in those cases introduced in the orders or rules of reference, that the award was to be delivered to the parties, or, if either of them should be dead before the making of the award, then to their respective personal representatives requiring the same; yet, there, verdicts were entered for the plaintiffs, subject to the awards of arbitrators, under orders of *Nisi Prius*. By the statute 17 *Car.* 2, c. 8, it is enacted, that, if either party die between verdict and judgment, the suit shall not abate, nor shall his death be alleged for error, so as the judgment be entered within two Terms after the verdict: and in the cases last referred to, the verdicts, having been entered by the consent of

(*a*) 2 Wms. Saund. 414 a, n. 5.
(*b*) 4 Taunt. 673.
(*c*) 3 Barn. & Cress. 144; *S. C.* 4 Dowl. & Ryl. 740.
(*d*) 4 Bing. 143.

the parties, the arbitrators had only to determine the amount of the damages for which the judgment was ultimately to be entered up. In the late case of *Dowse* v. *Coxe* (*a*), the plaintiff declared that certain differences had arisen, and a suit was pending in *Chancery*, in which the plaintiff and divers other persons, including infants, were plaintiffs, and *A. B.*, *C. D.* (since deceased), and *E. F.*, defendants; and that it was ordered by the Vice-Chancellor, with the consent of the attornies of the parties in the suit, that the several matters in question in the suit, and all disputes and differences then subsisting between certain of the plaintiffs and *A. B.*, and *C. D.* since deceased (being certain of the defendants), should be referred to the arbitrament of *J. S.*, who was to be at liberty to make one or more award or awards as he should think fit; and that, in case either of the parties should *happen to die before the making of the award*, the reference was not to abate, but the executors and administrators of the parties so dying, were to be considered and taken as parties to the order, in like manner as their testator and intestate; and that, before the making of the award, *C. D.* died; and the arbitrators afterwards awarded that the defendants, executors of *C. D.*, should pay the plaintiff a given sum, on a certain day, out of *C. D.'s* assets, by reason of which the defendants, as executors, became liable to pay; and being so liable, they, executors as aforesaid, promised to pay:—the Court of *Common Pleas* held that the authority to refer was not revoked by the death of *C. D.* There, however, the arbitrator expressly awarded that the executors of *C. D.* should pay *out of the assets* of the testator. But the judgment in that case has been reversed by the Court of *King's Bench*, in error (*b*); and although that Court decided on a different point, *viz.* that the sub-

(*a*) 10 B. Moore, 272; *S. C.* 3 Bing. 20.

(*b*) *Biddell* v. *Dowse* (in error), 6 Barn. & Cress. 255.

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mission to arbitration was not mutual, yet the case of *Dowse* v. *Coxe* cannot now be considered as an authority. Notwithstanding the clause in the submission in this case, it is necessary to consider the authority of an arbitrator, and from whom he derives it. Where it is conferred by the act of the parties alone, he is the mere agent or representative of both, appointed to settle differences existing between them; and having a mere delegated authority as such agent, the death of either of his principals is a revocation of his authority, and an award made by him after the death cannot be binding on the executors or administrators of the deceased. A submission to an arbitration is analogous to a power of attorney, which is revocable and revoked by the death of the party making it. And in *Bacon's Abridgment* (*a*) it is laid down, that "the authority given by letter of attorney must be executed during the life of the person that gives it; because the letter of attorney is to constitute the attorney my representative for such a purpose; and therefore can continue in force only during the life of me that am to be represented; and hence it is, that if *J. S.* make a letter of attorney, to deliver seisin after my death, it is void, because he cannot deliver seisin during my life; for that were plainly without any authority from me; nor can he do it after my death, for the former reason." Where, therefore, a warrant of attorney is given to confess a judgment, in order to obtain leave of the Court to enter it up, it must be expressly sworn, that the party giving it was alive within the term in which the application is made. In *Vynior's* Case, it was resolved, that, "though the defendant was bound in a bond to abide by and observe an award, yet that he might countermand it; as, if I make a letter of attorney to make livery, or to sue an action, in my name; or, if I assign auditors to take an account; or, if I make one my factor; or, if I submit

(*b*) Tit. "Authority," (E).

myself to an arbitrament; although these are made by express words irrevocable; or that I grant, or am bound, that all these shall stand irrevocably, yet they may be revoked: so, if I make my testament and last will irrevocable, yet I may revoke it; for my act, or my words, cannot alter the judgment of the law, to make that irrevocable, which is of its own nature revocable." In *Roby* v. *Twelves* (*a*), there was a custom within a manor, that any copyholder of that manor might make a writing, in the nature of a letter of attorney, to two copyholders of the same manor, to surrender his copyhold after his death; and Lord Chief Justice *Rolle* there said (*b*), "the death of the party did not revoke the writing made in the nature of a letter of attorney, for it was strengthened by the custom, and was not like an ordinary letter of attorney, which becomes void by the death of him that made it; for this custom is a law." In *Wallace* v. *Cook* (*c*), a seaman gave a power of attorney to his father to receive his wages; and Lord *Ellenborough* held, that the death of the former was a revocation of the power, and that no subsequent payment was legal. On these grounds, the Court will not interfere in this case; and the parties to the deed of submission, cannot, by their own act, *viz.* the introduction of the clause in question, make that irrevocable, which, by law, was revocable, so as to make it binding on the executors of *Morrison*, and, much less on his surety on the bond.

Lastly, the deed of submission is void, on account of the blanks left for the day on which the final decreet was to be made; and unless a certain time were specified, or fixed, the arbiters or oversman might defer deciding, from year to year. The usual terms, in orders of reference, are, so that the arbitrator shall make his award on or before a given day, with power to enlarge it, from that day, to the first of the succeeding, or any

(*a*) Styles, 423. (*b*) Id. 424. (*c*) 5 Esp. 117.

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other subsequent Term: and, if he do not, or the time be not duly enlarged, his authority is determined. And the Year-books, 4 *Ed.* 4, c. 14, and 20 *Hen.* 6, c. 18, are decisive to shew, that an omission, or blank, in a material part of an instrument, has the effect of avoiding it altogether.

Mr. *Campbell*, for the defendants in error.—The deed of submission is in the usual form, and framed according to the law of *Scotland*, and blanks are always left; and this Court cannot take notice of the law of that country.

[Mr. Justice *Park*.—By our law, a submission of this nature would be considered as a general authority, to be executed within a reasonable time. It seems to me, that there is no weight in the last objection.]

[Mr. Justice *Gaselee*.—By striking out the blanks, the inconsistency will be cured, and the submission will be prorogated to the time when the final decreet might be made.]

The main objection, then is, that the plaintiff in error is discharged by the death of *Morrison*, his principal, before award made; but he cannot avail himself of this objection, either by his *fourth* and *fifth*, or *second* and *third* pleas in bar. The deed of submission is virtually embodied in the *fourth* and *fifth* pleas, as they expressly refer to the *second;* which if they did not, they could not be supported. Where a party has declared on a submission-bond, although the defendant admit the award, and have complied with its directions, yet performance cannot be pleaded generally: he must crave *oyer* of the bond and condition, and shew the award, and how he has performed it; and, in so doing, he cannot allege performance of the *whole* of what he was required to perform, or his plea will be defective. The *second* plea sets out the submission, at length and alleges that no final award was made. The *fourth* plea is clearly bad, as it only excepts what is excepted in

the introductory part of the *first;* and there was nothing excepted in that plea, as it was merely *non est factum.* Supposing, however, that to be a mistake, the deed of submission is referred to as set out in the *second* plea, in the *fourth* and *fifth, viz.* that *Morrison,* his heirs, &c. did perform every covenant, &c. specified in the *said* deed or instrument of submission; which, of course, means the deed set out in the *second* plea; and in which the clause in question is contained, *viz.* that the submission shall not be determined or vacated by the death or insolvency of either of the parties. And, although one of these events has taken place, it will not vitiate the subsequent proceedings, or render the award of the oversman void. By the condition of the bond the plaintiff in error expressly bound himself in the penalty of 1000*l.*, if the executors of *Morrison* did not perform the award; and this he is bound to pay, notwithstanding a deficiency of assets. By the law of this country, as now settled by the late case of *Dowse* v. *Coxe,* which is fully warranted by previous decisions, and which remains unreversed as to this point, it is competent to parties to a submission to agree not to revoke by their own act, or that the death of either of them shall not operate as a revocation of the arbitrator's authority: and if a clause to that effect be introduced in the body of the deed of submission, it is binding on the representatives of the parties. Although it has been attempted to distinguish this case from those of *Tyler* v. *Jones,* and *Clarke* v. *Crofts,* as there the plaintiffs had obtained verdicts; yet here the express contract of the parties must prevail. At all events, the Court cannot say, that the proceedings subsequent to the death of *Morrison* are void by the law of *Scotland;* and it is expressly averred by the plaintiffs below, in their replication to the *second* and *third* pleas, that all the proceedings were regular, and according to the law of that country. By the civil law, a power of attorney is not revoked by the death of the principal, without notice to

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the party, to whom it is given. And although, in this case, the executors of *Morrison* might not be compelled to perform the award, yet the plaintiff in error is liable, as his surety, by the express terms of the condition of the bond.

Mr. *Brodrick*, in reply.—By the demurrer to the *fourth* and *fifth* pleas, the main question is, whether, without the clause in the deed of submission, the authority of the overseman were determined by the death of *Morrison*, before he proceeded to make his award. It is quite clear, that, without such a clause, he could have no authority: and, on the well-known rule, that the facts contained in one plea cannot be incorporated in another, unless there be an express reference to it, the only remaining question is, whether or not there be such a reference to the *second*, in the *fourth* and *fifth* pleas. The deed of submission referred to in those latter pleas, is that set out in the condition of the bond. They refer to the excepted part only, which applies solely to the performance of the covenants by *Morrison*, as expressed in the condition, without incorporating the whole of the provisoes contained in the deed of submission. The averment, that the proceedings have been regular, and according to the law of *Scotland*, applies only to the *second* and *third* pleas, and does not touch the question on the *fourth* and *fifth*. The defendants below should not have demurred, but should have traversed that fact. Looking, therefore, at the *fourth* and *fifth* pleas as independent of the *second* and *third*, the true question is, whether or not the authority of an arbitrator be determined by the death of one of the parties referring, independently of the clause in the deed of submission. And, although such a clause might be binding on the personal representatives, it cannot be extended to the obligor on a surety-bond, who is always entitled to the favourable consideration of the Court.

Cur. adv. vult.

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Lord Chief Baron ALEXANDER now delivered the judgment of the Court as follows:—

This is an action brought by the defendants in error against *Macdougall*, the plaintiff in error, on a bond. The declaration states the single bond. The *first* plea craves *oyer* of the condition, which is set out accordingly, and from which it appears that a deed of submission, or reference, in the *Scottish* form, had been made at *Glasgow*, between one *Æneas Morrison*, and the defendants in error (the plaintiffs in the action), referring all matters in difference between them to the award of two persons named, and, in case they differed, to an umpire; and, as the condition states, they bound themselves, their heirs, executors, administrators, and successors, to fulfil the award, under a penalty of 500*l*. The condition of the bond does not recite all the provisoes contained in the submission, but refers to all the provisoes, declarations, and agreements therein specified and contained Then it goes on to provide, that if *Morrison*, his heirs, executors, administrators, and successors, should truly perform and fulfil all *Morrison's* covenants and agreements in the submission in part recited, particularly if he or *they* should pay all sums directed to be paid to them, by (what is called) an interim decreet, or by any final decreet, then it was to be void, otherwise to remain in force. The defendant below (plaintiff in error) pleaded *first, non est factum*. The *second* plea states the deed of submission at large, and particularly a clause which raised the argument, *viz. that the submission should not vacate or expire through the decease or insolvency of either of the parties; but should, notwithstanding of such an event, be proceeded in, and the matters at issue determined, in the same manner as if such an event had not occurred.* The defendant below then proceeds to plead, as to the residue not excepted, that no final decreet was made; and, as to all excepting the final award, that *Morrison's* heirs, &c. did every thing which, by the said deed

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of submission, they were bound to do. In his *third* plea,—as to all the condition of the bond, except the part which relates to the payment of all such sums as the arbiters, or umpire, should award or direct to be paid by *Morrison*, his heirs, &c., and any money payable, in the nature of a penalty, to the plaintiffs below,—he pleads performance by *Morrison*, in his life-time, and by his heirs, &c. since his death; and, as to the part so excepted, that the arbiters, or umpire, did not award any money to be paid by *Morrison*, his heirs, &c. nor did any money, in the nature of a penalty, become payable by *Morrison*, his heirs, &c. and that no final award or umpirage was made. The *fourth* plea begins by excepting what is excepted in the introduction to the second plea, which relates to a final award; and the defendant below then pleads that *Morrison*, his heirs, &c. performed all interim orders, and that, as to what is excepted, *viz.* as to the final decreet, that, after the making of the deed of submission and bond, and before any final award or umpirage by the arbiters, or umpire, *viz.* on the 7th *October*, 1823, *Morrison* died. The *fifth* plea is the same in effect, *viz.*—as to all the condition, except the part excepted in the introduction to the second plea, performance by *Morrison* in his life-time, and his heirs after his death, and, as to the part excepted,—that before any money was awarded to be paid by *Morrison* or his heirs, and before any final award or umpirage, *Morrison* died. The course which the argument has taken renders it unnecessary to pursue the other pleas. To the *second* and *third* pleas, the plaintiffs below, in their replication, stated all the proceedings under the submission down to a final award, by which *Morrison's* executors were directed to pay a sum of 1500*l.*, and to deliver up a certain letter of credit, or pay 500*l.*, and then alleges breaches in not paying the 1500*l.*; and in neither delivering up the letter of credit, nor paying the 500*l.*, which was the alternative. The defendant below rejoined, protesting that the submis-

sion was revoked by the death of *Morrison*, and averred, as to the non-performance of the final award, that *Morrison* died insolvent. The plaintiffs below surrejoined, and demurred specially; and the material part of the demurrer is, that by the deed of submission it is expressly provided, that the submission should not vacate or expire by the death or insolvency of either of the parties; yet that the defendant below had inconsistently pleaded the insolvency of *Morrison* in excuse of performance, although the award was duly made under the submission. The defendant below joined in demurrer. The plaintiffs below demurred specially to the *fourth* and *fifth* pleas, setting out the clause in the submission, and stating that the defendant below, in his pleas, had alleged the death of *Morrison*, before the making of the award, without having shewn that the submission was proceeded in, and the matters at issue determined, according to the proviso, after his death; or, that the award was not made after his death; or, if made, that it was performed by the heirs or executors of *Morrison*.

Two questions have been principally argued; one, upon the merits; the other, of form only, but which it is necessary to dispose of, in order to get at the merits of the case. The question on the merits is, whether or not the award be valid, it not having been made until after the death of *Morrison;* or, in other terms, whether the deed of submission were not revoked by his death. As to the question of form, it is whether the pleadings have been so managed on the part of the defendant below, as to allow the general question to be raised, so that the Court can take notice of that clause introduced in the submission, which, it is contended for the plaintiffs below, preserves the validity of the award, notwithstanding the death of *Morrison* before it was made. The argument has mainly arisen on the *second* and *third*, and on the *fourth* and *fifth* pleas. Both the latter state, that the award is invalid, as *Morrison* died before it was made. This, by the demurrer of the plaintiffs

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below, is said to be indifferent, because there is an express condition or proviso in the submission, that the deed of submission should not expire by death. In order to shut out this clause by the form of the pleadings, it was strongly contended, that the *fourth* and *fifth* pleas, and the demurrer to them, must be treated and considered as if no other pleas had appeared on the record; and that no facts can be transferred from any other part of it, in order to enlarge the statement, or supply the deficiencies of those particular pleas; and therefore, that, as no part of the deed of submission is stated either in the *fourth* or *fifth* pleas, it does not appear upon the face of them, that the deed of submission contains any clause or proviso that the submission should not be vacated by the death of either of the parties before the award. If so, the consequence would necessarily be, that the award would be void by the general law, as being made after the death of one of the parties referring. If these premises were true, the conclusion would follow. But the Court think that the premises cannot be supported. It must be admitted, that in ordinary cases, that which is stated in a part of one plea, cannot be transferred to another; yet if the plea, which appears deficient of itself, referred to another which supplies such deficiency, the Court may avail itself of the reference for that particular purpose. In this case there is such a reference. The *second* plea sets out the deed of submission at large, which contains the clause in question; and the *fourth* and *fifth* pleas refer to the *second*, and to the deed of submission. The *fourth* plea commences by excepting what is excepted in the introduction to the *second* plea, which, *by mistake*, is called the *first*, in which there is nothing excepted; and the defendant below then proceeds to state that *Morrison*, in his life-time, and his heirs, &c. since his death, did perform every covenant, clause, or agreement, specified in the *said* deed or instrument of submission, which he, *Morrison*, his heirs, &c. ought to have performed as to any interim decreet; and as to the

residue, which is before excepted, that, after the making of the *said* deed or instrument of submission, and before any final award, *Morrison* died. Now here is an express reference to the introduction to the *second* plea, in which the deed of submission is found, as well as an express reference to such deed, which is only to be found in the *second* plea. All these constitute a clear reference to the submission, as stated in the *second* plea, and the Court think such reference warrants the defendants in error, in their demurrer to the *fourth* plea, to refer to the provision in the submission, as stated in the *second*, which provides, that the submission should not expire by the death of either of the parties. Therefore, under the particular circumstances of this case, we feel ourselves relieved from those difficulties which have been opposed to our getting at the real merits, *viz.* Whether the clause inserted in the submission is vague and nugatory; and whether, when parties so stipulate, an award is not good, although made after the death of one of them. It appears to us, that many cases have decided that the clause in question will uphold the award. However, there can be no doubt, that where there is no express stipulation upon the subject, the authority given to an arbitrator is revoked by the act or death of a party referring; and that an award made after such death is null and void. But the question here is, whether the parties cannot effectively stipulate that the death of one or either shall not revoke it. This point seems to be now perfectly established.

In the year 1817, the case of *Toussaint* v. *Hartop* came before Lord Chief Justice *Gibbs* and the Court of *Common Pleas*. There, there was no provision of this sort, and the Court set aside the award; but his Lordship said (*a*), "This decision will be of the less consequence, because, in future practice, care will be taken that the rule of reference shall provide for this case." So, in *Cooper* v. *Johnson*,

(*a*) 7 Taunt. 574.

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in 1819, which was a similar case, the Court of *King's Bench* did the same thing; and Lord Chief Justice *Abbott* said (*a*), "It may be proper, in orders of *Nisi Prius*, in future, to insert a clause to obviate the inconvenience arising from the death of either party before the making of the award." So, in *Blundell* v. *Brettargh*, in 1810, Lord *Eldon* said (*b*), "If the mode and means of settling the terms of a contract are an award and umpirage, the terms must, *unless otherwise contracted*, be settled while the parties are living, as the death of one has the effect of a revocation of the power to make an award."

All these three Courts, therefore, prospectively considered this provision as the means of preventing future inconveniences; and, when these means have been resorted to, they have been acted on accordingly. The cases of *Tyler* v. *Jones*, decided in 1824, and *Clarke* v. *Crofts*, in the last *Easter Term*, are precisely in point; and the case of *Dowse* v. *Coxe* is an authority, in every way, as far as regards this question; for although the judgment of the Court of *Common Pleas* in that case was reversed by the Court of *King's Bench* in error, yet the judgment of the latter Court proceeded upon other and different grounds: and every view of justice and convenience is in favour of these authorities.

On this view of the whole of the case, such is the answer to the argument as to the *fourth* and *fifth*, and also to the *second* and *third* pleas; independently of which, there is another answer to the two latter. In the replication to those pleas, after detailing with great minuteness all the proceedings under the submission, there is an averment that they are valid and effectual *according to the law of Scotland*, which fact was not traversed by the defendant below, as it might have been, and therefore stands admitted. On the whole, therefore, we are unanimously of opinion, that the judgment must be affirmed.

Judgment affirmed.

(*a*) 2 Barn. & Ald. 395.

(*b*) 17 Ves. 242.

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Mr. *Campbell* then applied for interest, from the time of signing final judgment, which the Court refused, on the ground that the penalty of the bond was the debt in law; that the question would have been different if breaches had been assigned under the statute 8 & 9 *Will.* 3, c. 11, s. 8; although, in point of justice, the defendants in error were entitled to it.

THE KING *v.* The late Sheriffs of London, in a Cause between WILSON and GOLDSTEIN.

Tuesday, Nov. 27th.

A RULE *nisi* was obtained by Mr. Serjeant *Andrews* on a former day in this Term, that an attachment, which had been issued against the late Sheriffs of *London*, might be set aside on payment of costs, on an affidavit, which stated, that bail had justified by mistake in the Court of *King's Bench*, and that they had since justified in this Court; and that the present application to set aside the attachment was at the instance of the bail, without collusion with, or indemnity from, the defendant *Goldstein*.

Mr. Serjeant *Wilde* insisted, that it should have been sworn that the application to set aside the attachment was made at the *expense* of the bail, as well as at their instance, and without collusion with the defendant *Goldstein*.

The Court observed, that although there was no rule in this Court, as in the *King's Bench*, in this respect, still, that, in future, they would require, on a motion by bail to set aside an attachment, it to be sworn that it was made at their *expense*, as well as at their instance, and without collusion with, or indemnity from, the defendant. This rule, however, must be made

Absolute.

On a motion to set aside an attachment against the sheriff (the bail in the action having, by mistake, justified in the Court of *King's Bench* instead of in this Court) the affidavit stated that the application was made at the instance of the bail, and without collusion with, or indemnity from, the defendant: —The Court granted the application, but observed, that, in future, they would also require the affidavit to state it to be *at the expense* of the bail.

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DOLLING, Demandant; RICE, Tenant; EUSTON, Vouchee.

The Court refused to allow the original writ and subsequent proceedings in a recovery to be amended by substituting therein "*Lancashire*" for "*Berkshire*," although it was sworn that the parties had no property in the latter county, and that the premises intended to be passed were wholly situate in the former.

MR. Serjeant *Onslow* moved, that the original writ and subsequent proceedings in this recovery might be amended by substituting the word "*Buckinghamhire*" for *Berkshire*," on an affidavit that the parties had no property in the latter county, and that it was intended that the lands in *Buckinghamshire* should pass by the recovery. He relied on the case of *Rashleigh*, demandant; *Lee*, tenant; *Smith*, vouchee (*a*); where the Court permitted the original writ and other proceedings in a recovery to be amended by inserting the words, "the county of *the town* of *Southampton*," for "the county of *Southampton*."

But the Court referred to an *Anonymous* case (*b*), where a recovery was refused to be amended by changing the county, the premises lying in a parish which ran into two counties, and lying wholly in the county omitted, and no part in the county mentioned; and the Court there said, "it is impossible to change the recovery from one county to another; and, in *Rashleigh*, demandant, the Court considered the omission as a clerical misprision only, and not as a substitution of one county for another; which, they said, they had often refused."

The learned Serjeant, therefore, took nothing by his motion.

(*a*) 4 Taunt. 855. (*b*) 3 Taunt. 418.

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED

IN THE

Courts of Common Pleas

AND

Exchequer Chamber,

IN HILARY TERM,

IN THE EIGHTH AND NINTH YEARS OF THE REIGN OF GEORGE IV.

MEMORANDA.

IN the course of the last vacation, Sir *James Scarlett*, Knight, resigned the office of Attorney-General to his Majesty, and Sir *Charles Wetherell*, Knight, was re-appointed.

Lord Chief Justice *Best* was unable to attend the Court, after *Friday*, the 1st. of *February*, by severe indisposition.

1828.

Wednesday, Jan. 23d.

FAIRMAN *v.* FARQUHARSON.

In an action on a bond, at the suit of the obligee, for the benefit of the assignee, against the obligor, the affidavit to hold to bail was made jointly by the plaintiff (the obligee) and the assignee, the former swearing that a certain sum was due for principal and interest on the bond, and that he had assigned it to the latter; and the latter, that the sum due on the bond still remained unpaid, and due and owing to him as assignee:—Held sufficient.

THE defendant in this cause was held to bail on the following affidavit of debt:—"*Edward Gregory Fairman*,

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of &c., and *John Williams*, of &c., severally make oath and say: and first, this deponent *Edward Gregory Fairman*, for himself, saith, that a certain bond, bearing date the 3d *April*, 1826, was duly made and entered into by *Barclay Farquharson*, to him, this deponent, in the penal sum of 19,825*l.*, conditioned for the payment of 9,912*l.* 10*s.* with lawful interest for the same, at a day now past, and which said sum of 9,912*l.* 10*s.*, with interest thereon, still remains wholly due and unpaid; and this deponent further saith, that, since the making of the said bond, the same, with all monies due thereon, hath been by him duly assigned unto the other deponent, *John Williams;* and this deponent further saith, that there is *now due and owing* on the said bond, for principal and interest, *the sum of* 10,000*l.;* and this deponent, *John Williams*, for himself, saith, that the sum due upon the said bond still remains unpaid, and due and owing to him, this deponent, as such assignee as aforesaid." The deponent *Fairman* negatived a tender to himself, or to *Williams* to the best of his knowledge and belief, and the latter negatived a tender to himself in direct terms.

Mr. Serjeant *Wilde*, now applied for a rule to shew cause why the defendant should not be discharged out of custody, on entering a common appearance, on the ground of the insufficiency of the affidavit. He submitted, that it was not sworn by either of the deponents, that the defendant was indebted to the plaintiff on the record. The obligee did not state that the defendant was indebted either *to him* or to *Williams;* but merely that a certain sum was due and owing on the bond; and the affidavit of the assignee merely stated, that the sum due upon the bond still remained unpaid, and due and owing to him, as assignee, without alleging that any precise sum was actually due. In *Byland* v. *King* (*a*), the affidavit was made

(*a*) 1 B. Moore, 24; *S. C.* 7 Taunt. 275.

by the assignee, who stated that the defendant was indebted to the plaintiffs (the obligees) in a certain sum, for principal and interest due on a bond made and entered into by the defendant to the obligees, and which said bond had been duly assigned to the deponent; and such affidavit was held to be sufficient. In *Tidd's Practical Forms* (*a*), the form of an affidavit made for the benefit of the assignee of a bond, is, "that *C. D.* is justly and truly indebted to *E. F.*, in trust for this deponent, in the sum of £——, for principal and interest due on a bond, bearing date &c., and made and entered into by the said *C. D.* to the said *E. F.*, in the penal sum &c., and which bond hath been since duly assigned by the said *E. F.* to this deponent." In both these affidavits it expressly appears, that the defendant was indebted to the assignee, in a certain sum; whilst here, the affidavit contains a mere equivocal statement by the assignee, that the sum due on the bond was due and owing to him as such assignee; and if one shilling only were due, the defendant might be detained in custody. In an action for a malicious arrest, the question would be, whether or not there were any debt, as sworn, due to the plaintiff on the record; and such debt must be a legal and not an equitable debt. As, therefore, in this case the obligee has not sworn, that the sum due on the bond was due and owing to him, or to any other person; and as the assignee has not supplied that omission by shewing what sum was actually due to him as such, the affidavit is clearly deficient.

Lord Chief Justice BEST.—I am of opinion that there is no pretence for this rule. Sufficient appears on the affidavit to shew that the sum sought to be recovered is actually due from the defendant. The bond was given to *Fairman*, to secure the payment of 9,912*l.* 10*s.* and inter-

(*a*) 6th Ed. 90, (s 64.)

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est; and he swears that that sum is still wholly due and unpaid; that the bond, with all monies due thereon, was by him duly assigned to the other deponent *Williams;* and that there is now due and owing on the bond, for principal and interest, the sum of 10,000*l.* He does not swear, that that sum is due to him, because he had assigned his interest in the bond to another; but the assignee swears, that the sum due upon the bond still remains unpaid, and due and owing *to him;* and such sum must be taken to refer to that sworn to by the plaintiff, *viz.* the sum of 10,000*l.* That appears to me, to be a true statement of the transaction. The defendant was at first indebted to the plaintiff, in 9,912*l.* 10*s.* according to the condition of the bond; and he having assigned it to another, the latter, as assignee, swears, that that sum which, previously to the assignment, was due to the plaintiff on the record, is due to him, and by virtue of that assignment he is by law entitled to recover. Precedents are entitled to little or no weight, unless they are established by long and uninterrupted usage; and here it sufficiently appears, that the sum sought to be recovered was due to the assignee of the bond, for whose benefit the affidavit was made. I think that is the proper construction of it. The case of *Byland* v. *King*, does not appear to me to be at all applicable to the present, nor was this point there raised; all that the Court decided there was, that an affidavit to hold to bail, stating that the defendant was indebted to the plaintiff in a certain sum, for principal and interest due on a bond, is sufficient to express that such bond was conditioned for the payment of money, without setting forth the condition; and that if an assignee of a bond *positively* negative a tender in bank notes, it is unnecessary for the obligee to join in such affidavit.

Mr. Justice PARK.—I am of the same opinion. The defendant applied to me at Chambers in the first instance, and I thought that the affidavit was sufficient.

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Mr. Justice BURROUGH.—I am also of opinion that this affidavit is properly framed.

Mr. Justice GASELEE.—I am not aware of any precedent, in a case of this description, where the obligee swears that the money is due to him. The only use of the assignee's being joined in the affidavit with the obligee, is, that the latter may, in the first instance, swear that a sum is due on the bond, and that his right has been assigned to the former, who swears, that the sum due is due to him as assignee; and here it is a necessary inference, that the sum sworn by the assignee to be due to him on the bond, is that referred to by the obligee in his affidavit, *viz.* 10,000*l.* Two forms of an affidavit of debt, where it is made for the benefit of an assignee of a bond, are given in *Tidd's Practical Forms*, as well as one by assignees of a bankrupt for part of the money due on a bond assigned to the bankrupt. This affidavit pursues the form adopted by Mr. *Archbold* (*a*), and appears to me to be sufficient.

Rule refused.

(*a*) 2d. Edit. p. 14.

DOE, on the demise of TILT, *v.* STRATTON.

Wednesday, Jan. 23d.

The defendant held certain premises of the lessor of the plaintiff, under an agreement for a lease for seven years. No lease was executed, but the defendant continued to occupy under the agreement until the expiration of the term, when the landlord brought an action of ejectment against him, without having given him a notice to quit:—Held that such notice was unnecessary.

THIS was an action of ejectment, brought by the lessor of the plaintiff, as landlord of certain premises at *Limehouse*, against the defendant as tenant.

At the trial before Lord Chief Justice *Best*, at the Sittings at *Westminster*, after the last Term, it appeared, that the defendant held under an agreement for a lease, dated the 7th *September*, 1820, by which it was agreed (amongst

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other things), that, in consideration of 50*l.*, paid by the defendant to the lessor of the plaintiff, and of the rent, matters, and agreements, thereinafter contained on the part of the defendant, he, the lessor of the plaintiff, promised and agreed, that he, his heirs &c., should and would, on or before the 29th *September* then next ensuing the date of the agreement, upon request made to him or them, in writing, for that purpose, grant and execute unto the defendant, his executors, &c., a good and effectual demise or lease, by indenture, of the premises in question, for the term of seven years, to be computed from the said 29th *September*, 1820, at the yearly rent of 100*l.*, payable quarterly; and it was thereby agreed, by and between the said parties, that the lease should contain covenants, on the part of the defendant, his executors &c., for payment of rent, to keep the premises in repair during the term, and to quit and deliver up the same at the end of the said term. No lease was ever executed, or required by the defendant, but he entered into possession under the agreement, and remained in as tenant for the whole term to which it was intended that the lease should extend; and, shortly after its expiration, the plaintiff brought the present action, without having given the defendant a notice to quit. The Jury found a verdict for him, his Lordship reserving leave to the defendant to move to set it aside, and that a nonsuit might be entered, in case the Court should be of opinion that such notice was necessary.

Mr. Serjeant *Jones*, now applied accordingly, and submitted that, no lease having been executed, and the contract between the parties being a mere agreement for a lease, and not an actual demise, the defendant was by legal inference a tenant from year to year, and, as such, entitled to the usual notice to quit. Although, if a lease be granted for a stipulated period, and the term is to expire on a precise day, there is no occasion for a notice

to quit, previously to the commencement of an action, as the convention of the parties shews when the tenancy is to expire; yet if a person hold under an agreement only, and pay rent subject to it, he is merely a tenant from year to year, and is entitled to notice. In *Hamerton* v. *Stead* (*a*), a tenant from year to year having, during a current year, entered into an agreement for a lease to be granted to him and *A. B.*; and from that time *A. B.* entered and occupied jointly with him; the Court held, that, by this agreement and the joint occupation under it, the former tenancy was determined, although the lease contracted for was never granted; and that an occupation of premises pending the execution of a lease constitutes the relation of landlord and tenant; and Mr. Justice *Holroyd*, said, "taking the document in question not to amount to a lease, yet the entry and holding by *A. B.* and the plaintiff together under it, created a new tenancy, either from year to year, or at will; and that, according to *Mellow* v. *May* (*b*), would terminate the old holding. Perhaps, until a lease was executed, it might be considered, that the two held at the rent mentioned in the agreement, but still it might be a holding under the agreement. For, there might be an occupation on a *quantum valebat* until the execution of the lease, and although no distress for rent could be made, yet still a tenancy would exist;" and Mr. Justice *Littledale* said, "where parties enter under a mere agreement for a future lease, they are tenants at will; and if rent is paid under the agreement, they become tenants from year to year, determinable on the execution of the lease contracted for, that being the primary contract;" and if so, it is quite clear, that the tenant is entitled to a notice to quit. In *Mann* v. *Lovejoy* (*c*), it was held, that where the occupier

(*a*) 3 Barn. & Cres. 478; *S. C.* 5 Dow. & Ryl. 206.
(*b*) Moore, 636. (*c*) Ryan & Moody, 355.

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of premises, under an agreement for a lease, at a certain rent, pays rent, he becomes tenant from year to year, on the terms of the agreement, and the landlord may distrain; and Lord Chief Justice *Abbott* there said, "The instrument certainly does not amount to a demise; but the question is, whether, when there is a continued occupation and payment of rent under such an agreement, this does not constitute a tenancy from year to year, on the terms of that agreement. In this case there has been a continued occupation, and a payment of the rent mentioned in the agreement; and these facts are not inconsistent with the agreement, but rather in affirmance of it. I am of opinion, that, taking the agreement and connecting it with the facts proved, there is a tenancy from year to year, at the rent mentioned in the agreement, which tenancy the defendant (the landlord) could not determine without giving notice, and on which he may distrain for rent." So, here, the defendant held as tenant from year to year under the terms of the agreement, and paid rent accordingly, and if so, the plaintiff could not determine the tenancy without a notice to quit, although the term mentioned in the agreement might have expired. The rights of the lessor and lessee must be placed on equal terms, and it would be too much to say, that the latter should be compelled to hold under the agreement for the full term, and that he should be liable to an ejectment at the expiration of it, without a notice to quit.

Lord Chief Justice BEST.—The case of *Doe* d. *Bromfield* v. *Smith* (*a*) was cited at the trial, to shew that a notice to quit was unnecessary. It must be considered, that the agreement between the parties was executed, and although I did not decide the point at *Nisi Prius*, I did not feel much difficulty, and am now clearly of opinion

(*a*) 6 East. 530.

that the present action is maintainable without such notice, and it would be multiplying notices to quit to an enormous extent, if we were to hold otherwise. The words of the Lord Chief Justice, in *Mann* v. *Lovejoy*, are very material. He said, "the question is whether, when there is a continued occupation and payment of rent under an agreement (not amounting to a demise), this does not constitute a tenancy from year to year, *on the terms of that agreement*. In this case, there has been a continued occupation, and a payment of the rent mentioned in the agreement; and these facts are not inconsistent with the agreement, but rather in affirmance of it." That controlled the nature of the tenancy, and if either party wished to put an end to it, he might do so, by giving the other a notice to quit. Here, however, the seven years had expired. The parties knew, by the terms of the agreement, that the tenancy was to end at that time, and if a lease had been granted, the defendant would have been bound to give up the possession without a notice to quit. The one party knew that he was to quit possession, and the other that he was to take it, on a given day. I am therefore clearly of opinion that no notice was requisite.

Mr. Justice PARK.—I am of the same opinion.

Mr. Justice BURROUGH.—Although a notice to quit would have been necessary in order to determine the tenancy before the expiration of the seven years created by the terms of the agreement, yet as the parties expressly agreed that the tenancy should end on a given day, no notice to quit could be required.

Mr. Justice GASELEE.—I think the Court have put the true construction on this agreement, and that if the defendant were to be held entitled to a notice to quit, it would give him an advantage over the party under whom

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he took possession, for he might have given his landlord a regular notice to quit at any time during the term; and yet he contends not only that the latter could not do so, but that he could not maintain the present action, without notice, although the term had actually and legally expired, according to the agreement.

Rule refused.

Wednesday, Jan. 23rd.

TALLENT *v.* MORTEN and Wife.

In an action for a libel contained in a letter written in *Buckinghamshire*, the Court allowed the *venue* to be changed from *London* to that county, on the usual affidavit, that the plaintiff's *cause* of action (if any) arose there, it not appearing that the letter was published or circulated in a different county; and held that the affidavit was sufficient, although the declaration contained counts for slander as well as for the libel.

IN the last Term, Mr. Serjeant *Bosanquet* obtained a rule, calling on the plaintiff to shew cause why the venue in this action should not be changed from *London* to the county of *Buckingham*, on the usual affidavit, made by the defendant *Morten*, that the plaintiff's cause of action (if any) arose in the county of *Buckingham*, and not in the city of *London*, or elsewhere, out of the said county of *Buckingham*.

Mr. Serjeant *Wilde* shewed cause, and stated, that the action was brought for the publication of a libel, contained in a letter, purporting to be addressed to the female defendant, and circulated in the neighbourhood of *Amersham*, where the parties resided. The learned Serjeant relied on the case of *Pinkney* v. *Collins* (*a*), where the Court of *King's Bench* refused to change the venue in an action for a libel published in a newspaper, on the ground that, although the paper might be printed in one county, it was circulated and sold in others: and although in *Metcalfe* v. *Markham* (*b*), which was an action for a libel in a letter written in *Yorkshire*, and sent by the post into *Germany*, it was held, that the venue might be changed from *London* to

(*a*) 1 Term Rep. 571. (*b*) 3 Term Rep. 652.

Yorkshire, on the usual affidavit; the Court there also taking a distinction between libels dispersed throughout the kingdom, and those which are only published in one county; yet, in that case, the letter was not to be opened in this country, as it was addressed to a party on the continent; whilst here, although it was written in *Buckinghamshire*, it might be circulated and opened in another county; and, therefore the defendant cannot swear that the cause of action arose in *Buckinghamshire*, and not elsewhere; and in *Hitchon* v. *Best* (*a*), this Court refused to change the venue from *London* to *Worcester*, in an action for a libel contained in a letter, upon an affidavit that the deponent believed the letter to have been written at *Stafford*, because it bore the *Stafford* post-mark.

Mr. Serjeant *Bosanquet*, in support of his rule.—The defendant has sworn that the plaintiff's cause of action arose in *Buckinghamshire*, and not elsewhere; it was, therefore, incumbent on the plaintiff to shew that this case furnished an exception to the general rule; and in *Hitchon* v. *Best*, the party merely swore to his belief. There is nothing on the face of the declaration to shew that the letter containing the libel had been circulated in a different county, nor has the plaintiff made an affidavit of that fact. In *Pinkney* v. *Collins*, the libel was printed in a newspaper which was circulated and sold in various counties; and the case of *Metcalfe* v. *Markham* is precisely in point, to shew that, if a letter containing a libel be opened in the same county in which it is written, the venue may be changed to that county on the usual affidavit. The plaintiff must be fully aware of the nature of the matters contained in the letter on which his complaint is founded; and it was incumbent on him to shew, not only that the defendants were connected with it, but that it was

(*a*) 1 Brod. & Bing. 299.

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not opened or published in the county in which it was written, or at least that it was published elsewhere.

Mr. Justice PARK.—There can be no doubt but that we have a discretion to change the venue in an action for a libel under special circumstances; and although the venue in such actions cannot generally be changed, yet, if the writing and publication be both confined to one county, it may be changed into such county; and as the defendant, *Morten*, has expressly sworn that the plaintiff's cause of action arose wholly in *Buckinghamshire*, and not elsewhere, the plaintiff should have shewn us that the libel was published in a different county from that in which it was written.

Mr. Justice GASELEE.—The general rule is, that the venue in an action for a libel cannot be changed if it be written in one county and sent into another, as the defendant cannot in such case swear that the cause of action arose wholly in the county where it was written; but in *Freeman* v. *Norris* (*a*), the Court changed the venue in an action of this description, the letter containing the libel having been both written and published in the same county. There, it does not appear that the applicant made any affidavit; but here the defendant has sworn that the cause of action arose in *Buckinghamshire*, and not elsewhere, and he therefore throws the *onus* on the plaintiff to negative that fact.

The Court ordered the rule to be enlarged until this Term, for the purpose of looking into the cases on the subject; and on its being now called on in the peremptory paper,

Mr. Serjeant *Wilde* admitted that the current of au-

(*a*) 3 Term Rep. 306.

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thorities was against him, and that he could not effectually oppose the rule; but submitted, that the defendant's affidavit was insufficient, as the declaration contained counts for verbal slander, as well as on the libel. These, he contended, were two distinct causes of action, and that the affidavit did not cover both; as the defendant had sworn, that the plaintiff's *cause* of action (if any) arose in *Buckinghamshire*, and not elsewhere; and that if either the libel were published, or the words spoken, *out* of that county, the venue could not be changed.

But the Court observed, that there was no weight in the objection; that if a declaration contain counts for goods sold and delivered, work and labour, and the money counts, they all apply to one cause of action; and therefore that the affidavit was sufficient.

Rule absolute (*a*).

(*a*) *Clissold* v. *Clissold*, 1 Term Rep. 647; See 1 Tidd's Practice, 7th Edit. 624-5.

FANSHAWE, Clerk, *v.* HEARD.

Thursday, Jan. 24th.

THIS was an action of special *assumpsit*. The first count of the declaration stated, that, before and at the time of making the agreement thereinafter next mentioned, a certain action had been commenced, and prosecuted, by, and at the suit of the plaintiff, against the defendant, in one of his Majesty's Courts of law, at *Westminster*, for a breach of a certain contract before then entered into, and, at the time of making the said agreement, existing, by and

The plaintiff having commenced an action against the defendant, it was agreed in writing that he should discontinue it, and the defendant engaged to pay the legal costs incurred by the plaintiff in the suit, as between party and party. In an action to recover the amount of such costs after taxation, it was averred in the declaration that the plaintiff had discontinued the action:—Held, that such averment could not be supported without proof of a rule to discontinue.

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between the plaintiff and defendant, and for money then, and at the time of the making of the said agreement, due and owing from the defendant to the plaintiff, and which said action, at the time of making the said agreement, was depending in one of the said Courts of law, whereof the defendant had notice, and thereupon, theretofore, to wit, on &c., at &c., by a certain agreement, then and there made by and between the plaintiff and defendant, it was agreed (among other things), that the plaintiff *should discontinue* the said suit at law; and the defendant did, in and by the said agreement, agree *to pay the legal costs* incurred by the plaintiff in the said action, *as between party and party*. The plaintiff, after stating mutual promises, averred, that he, confiding in the promise of the defendant, did afterwards, to wit, on &c., at &c. *discontinue* the said action, and hath thence, hitherto, discontinued and stayed all proceedings therein; and that the legal costs incurred by the plaintiff in the said action, as between party and party, were afterwards, to wit, on &c., duly fixed and ascertained at the sum of 13*l.* 12*s.* 10*d.*, of which the defendant had notice, and was requested by the plaintiff to pay that sum; and assigned for breach, non-payment thereof. There were other counts varying the terms of the agreement, in all of which the plaintiff averred that he had *discontinued* the action, and stayed all the proceedings therein, against the defendant. To these were added the common money counts, and a count on an account stated. The defendant pleaded the general issue.

At the trial, before Mr. Justice *Burrough*, at *Guildhall*, at the Sittings after the last Term, it appeared, that the plaintiff was the vicar of *Dagenham* in *Essex*, and that the defendant was a surveyor; that a certain sum being due to him from the defendant, the plaintiff commenced an action against him, for a breach of contract, and for money had and received; that the defendant suffered judgment by default; that the matters in dispute were after-

wards referred to two surveyors; and that, on their decision, the agreement in question was entered into and executed by the plaintiff and defendant, by which it was agreed, that the plaintiff *should discontinue* the suit commenced by him against the defendant, for a breach of contract, and for money had and received by him; and the defendant agreed to *pay the legal costs* incurred by the plaintiff in the said action, *as between party and party*. It also appeared, that the costs of the action were afterwards taxed at 13*l*. 12*s*. 10*d*., and that the defendant's attorney, shortly after the execution of the agreement, offered, by letter, to pay the attorney for the plaintiff 11*l*. 11*s*. 6*d*., in discharge of such costs, which the plaintiff consented to accept; but it not having been paid, the present action was brought. For the defendant, it was objected, that the plaintiff was not entitled to recover, as he had not proved that a rule to discontinue had been taken out, by which alone the suit, mentioned in the agreement on which the present action was founded, could properly be said to be discontinued; and the learned Judge, being of opinion that the objection was well founded, directed a nonsuit, reserving leave to the plaintiff to move that it might be set aside, and a verdict entered for him, in case the Court should be of opinion that a rule to discontinue was unnecessary.

Mr. Serjeant *Taddy* now moved accordingly, and that a verdict might be entered for the plaintiff for 11*l*. 11*s*. 6*d*., the sum offered to be paid by the defendant's attorney for the taxed costs of the former action. He submitted, that it was evidently the intention of the parties to the agreement on which the present action was founded, that the former suit should be discontinued, and that all further proceedings should be stayed, without a rule to discontinue; and that it was proved at the trial, that no further steps were taken by the plaintiff in prosecuting the suit, which was sufficient to entitle him to maintain this action, without

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going to the expense of taking out a rule to discontinue. A discontinuance is an intermission of the suit; for, in *Coke Littleton*, it is said (*a*), "Discontinuance signifieth an intermission. *Discontinuare nihil aliud significat quam intermittere, desuescere, interrumpere.*" And here it is quite clear that the parties did not contemplate a discontinuance at law, as the defendant agreed to pay the costs incurred by the plaintiff in the former action, *as between party and party*. A plaintiff can only discontinue on payment of costs; and in *Hale* v. *Norton* (*b*), the Court held that the plaintiff, though an administrator, could not discontinue without payment of costs. But, even supposing a rule to discontinue were necessary, the letter written by the defendant's attorney, offering to pay 11*l.* 11*s.* 6*d.* in discharge of the costs, is a waiver; and the plaintiff is entitled to recover that sum under the account stated, although the defendant afterwards refused to perform his promise.

Lord Chief Justice BEST.—I abstain from giving any opinion as to whether the plaintiff be entitled to recover on the account stated, as I have no doubt that this action could not be maintained until the former suit had been legally discontinued or put an end to; and here there was no rule to discontinue. It is true, that the ordinary rule is for a plaintiff to pay the costs of the discontinuance; but that may be got rid of by a special contract between the parties; and it is frequently done before a Judge at chambers. The meaning of a discontinuance is, that a cause must be effectually put out of Court, or legally terminated. That has not been done in the present instance; and, for any thing that appears to the contrary, the former suit might have been revived by the plaintiff the day after the agreement was made.

Mr. Justice PARK.—The terms of a rule to discontinue

(*a*) Page 325 a. (*b*) Barnes, 2d Ed. 4to 169.

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must depend on the circumstances of each particular case; and when a cause comes before us in Court we must look at it as lawyers, and it is quite clear that there could not be a legal discontinuance, unless the plaintiff had obtained a rule for that purpose.

Mr. Justice BURROUGH.—I had no doubt, at the trial, that the plaintiff could not maintain this action, as he did not shew that the former suit had been *legally* discontinued.

Mr. Justice GASELEE.—I remember a case at *Nisi Prius*, where it was held that the production of a rule to discontinue was not sufficient evidence of a discontinuance, but that it was incumbent on the plaintiff to shew that it had been entered on the roll.

Rule refused.

SCALES *v.* PICKERING and two Others.

Thursday, Jan. 24th.

THIS was an action of trespass. The declaration stated, that the defendants broke and entered four closes of the plaintiff, therein enumerated and described, situate in the parish of *St. Mary, Stratford*, in the county of *Middlesex*, and trod down and spoiled the grass growing in the said closes, and dug up, excavated, undermined, and subverted and damaged, the soil, and greatly obstructed, damaged, and spoiled, divers *paths;* and placed and laid divers large quantities of gravel, earth, and soil, in the said paths; and broke, damaged, and

By an Act of Parliament (49 *Geo.* 3, c. 72) for supplying the inhabitants of certain parishes with water, the Company were empowered (sect. 32,) to make and maintain water-works, aqueducts, &c. &c.; and, for the purpose of distributing the water to the different inhabitants, to dig and break up the soil and pavement of any of the roads, highways, *footways*, commons, streets, lanes, alleys, passages, *and public places*, within and near to the said parishes; and by the 34th section, it was provided, that the Company should not make any aqueduct, &c., across or over, or enter upon, the *private* lands or grounds of any person, *without the consent* of the owner or occupier; or into or upon any common, without the consent of the lord of the manor:—Held, that the word *footways*, in the 32nd section, must be confined to footways before houses, or in public places, and not extended to footways running across enclosed fields.

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spoiled divers water-pipes of the plaintiff in his said closes; and also broke down, damaged, and spoiled the fences, hedges, posts, rails, gates, and stiles, of the plaintiff, erected and being in his said closes, and took and carried away the materials thereof, and converted the same to their use; and filled up, and stopped up, the ditches, drains, and watercourses of the plaintiff, of and belonging to his said closes, and laid open the same to the adjoining lands; whereby divers of the plaintiff's cattle, depasturing and being in his said closes, strayed out of the same, and divers cattle of other persons strayed into the said closes, and did damage there to the plaintiff;—and the defendants, without the leave or licence and against the will of the plaintiff, erected and set up divers gates, and placed divers mains and pipes, in divers parts of the said closes, and locked and fastened the said last-mentioned gates, and kept the same so fastened, and the mains and pipes so laid, for divers long spaces of time, to wit, &c. &c. Plea—Not guilty.

At the trial, before Lord Chief Justice *Best*, at *Westminster*, at the Sittings after the last *Trinity* Term, it appeared, that the defendants were the Secretary, the Contractor, and the Engineer, of the *East London Water-Works Company*, and that the plaintiff was lessee of a piece of land in the parish of *St. Mary Stratford*, bounded on one side by *Old Ford Lane*, and by *Bear Binder Lane* on the other. That the plaintiff had lately divided the land into four fields, and erected hedges and fences around them; and that there was a *public footpath* leading across the fields from one lane to the other. That the defendants entered the fields or closes, and laid down mains and pipes, without the consent or permission of the plaintiff, for the purpose of *supplying* the inhabitants of *Hackney* with water from their works, which were situate near the residence of the plaintiff; and that in so doing they broke down his gates, in consequence of which his cattle escaped; and that a

pipe which the plaintiff had laid down to convey water from a pond in one of the fields to the other three, was destroyed, or rendered useless, the defendants having laid their pipes or mains at a considerable depth below it.

For the defendants, it was insisted, that they were authorized to enter the plaintiff's closes, and lay down the pipes, by virtue of the statute 47 *Geo.* 3, *sess.* 2, c. 72 (an act for better supplying with water the inhabitants of the parishes of *Stratford Bow*, otherwise *Stratford-le-Bow*, *Saint John Hackney*, and several other parishes, hamlets, townships, and places, adjacent or near thereunto, in the counties of *Middlesex* and *Essex)*, s. 32 (*a*). His

(*a*) By which it is enacted, "that it shall and may be lawful to and for the said Company of proprietors and their successors, by themselves, their deputies, officers, agents, servants, workmen, and assistants, to make, complete, and maintain, waterworks, aqueducts, reservoirs, water-wheels, steam-engines, and other engines, pipes, and other works necessary for the purposes of the act, in the parish of *Stratford Bow* otherwise *Stratford-le-Bow*, in the counties of *Middlesex* and *Essex;* and in the several parishes of *Saint John Hackney*, &c. &c.; also in the several hamlets, townships, or places following, that is to say, *Radcliffe*, &c. &c., and places adjacent or near thereunto, in the city of *London* and county of *Middlesex*, by means of such works, for supplying the same respectively with water from the river *Lea*, at or near *Old Ford*, in the said counties of *Middlesex* and *Essex;* and the said Company are hereby fully empowered, by themselves, their deputies, agents, workmen, or servants, to supply the said intended waterworks, aqueducts, reservoirs, and other works, whilst the same shall be making, and at all times for ever after the same shall be made, with water from the river *Lea*, at or near *Old Ford*, in the said counties of *Middlesex* and *Essex;* and to make such and so many feeders, tunnels, and shafts, and to make, erect, and set up, such and so many sluices, weirs, engines, steam-engines, and other machines, for supplying the said waterworks with water, and for any other purposes, for the making, maintaining, and using of such waterworks, as they, the said company of proprietors, or their successors, shall, from time to time, think proper and expedient; and for the purpose of *distributing* such water to the different inhabitants, and effectuating the several purposes of the act, it shall and may be lawful to and for the said company of proprietors and their successors, and to and for

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Lordship was of opinion, that the word "*footways*" in that section meant public footways, alleys, or passages, or footways by the side of a public road, and not in enclosed grounds; and more especially so, as by the 34th section (*a*),

their agents, officers, workmen, and servants, to dig and break up the soil and pavement of any of the roads, *highways*, *footways*, commons, streets, lanes, alleys, passages, and *public places*, within, adjacent, and near unto the said parishes, townships, hamlets, and places; and to sink and lay pipes, trunks, and other conveniences for the purposes aforesaid; and to put stop-cocks, or plugs, or branches from such pipes, trunks, and other conveniences, in such places and manner as shall be necessary for the purposes aforesaid, and from time to time to alter the position of, and to repair, relay, and maintain such pipes, trunks, stop-cocks, and plugs, and do all such acts, matters, and things, as they, the said company of proprietors, their successors and assigns, shall, from time to time, and at any time, think necessary and convenient, for completing, amending, repairing, improving, and using the works authorised by the act to be done and provided, according to the true intent and meaning thereof; and the said company of proprietors are hereby empowered to make such engines, houses, and other works, and all such cisterns, ponds, basins, main-pipes, rider-pipes, hand-pipes, stand-pipes, service-pipes, branches of lead and other metal, cocks, chamber-cocks, cocks in common, stop-cocks, valves, fire-plugs, air-plugs, fire-cocks, mains, feeders, fanapers, and pumps, as the said company of proprietors shall think requisite, for the several purposes of the said undertaking; and also from time to time to divert, alter, repair, widen, enlarge, amend, and discontinue the same; they, the said company of proprietors, their agents, deputies, officers, workmen, and servants, doing as little damage as may be, in the execution of the powers hereby granted to them, and making full satisfaction for any damages thereby occasioned."

(*a*) By which it is provided, "that nothing in the act contained shall authorize or empower the said company of proprietors, or any person or persons acting by or under their authority, to make any aqueduct, tunnel, feeder, or other works, for the supply of water, *across or over*, or to enter into or upon, the *private* lands and grounds of any body politic, corporate, or collegiate, or of any person or persons whomsoever, without the consent of the owner or owners, proprietor or proprietors, and occupier or occupiers thereof, or into or upon any commons, *commonable lands or fields*, or waste lands, without the consent of the lord of the manor, or other owner or owners thereof."

the Company could not enter the *private* grounds of another, or even commonable lands or fields, without the consent of the proprietor or occupier, or of the lord of the manor or other owner or owners thereof. And he observed, that the 41st section (*a*) requires a map or plan, describing the places where the reservoirs are to be made or erected, to be deposited with the clerk of the peace; and enacts that all parties interested shall have liberty to inspect the same; by which the Legislature did not intend that the Company were to be empowered to enter the *private* grounds of another, without his previous knowledge or consent. His Lordship, therefore, directed a verdict to be entered for the plaintiff, with leave for the defendants to move to set it aside, and that a new trial might be granted:—and if the Court should be of opinion, that the defendants were not authorised to enter the plaintiff's lands by virtue of the act, it was agreed that it should be referred to an arbi-

(*a*) Which (after reciting that a map or plan, describing the places where the said reservoirs are to be made or erected, had been deposited with the clerks of the peace for the counties of *Middlesex* and *Essex*) enacts, "That such map or plan shall remain in the custody of the said clerks of the peace for the time being, or their deputies, and that all persons interested therein shall, at all reasonable times, have liberty to inspect and peruse the same, and take a copy thereof, or any part thereof, paying a reasonable compensation to the clerks of the peace, or their deputies, for every such inspection; and that the said Company shall not make any other reservoir or reservoirs, aqueduct, feeder, or tunnel, or have any right or authority to take any other land, for making any other reservoir or reservoirs, or for making any other aqueduct, feeder, or tunnel, for the supplying of any water, than the reservoir or reservoirs, aqueduct, feeder or tunnel, in the said map or plan described; nor, in making the said reservoir or reservoirs, aqueduct, feeder, or tunnel, deviate more than twenty yards, of three feet each, from the place or places, line, or course, described in the said map or plan, without the consent in writing of the person or persons, body or bodies politic or corporate, in, or through, or upon, whose lands any such reservoir or reservoirs, aqueduct, feeder, or tunnel, shall be erected or made, or on or through whose lands any such deviation shall be made."

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trator to ascertain the damage he had actually sustained, in consequence of their laying down the pipes in question.

Mr. Serjeant *Wilde*, in the last Term, accordingly obtained a rule *nisi*, and submitted, that the defendants, as agents of the Company, had a clear right, under the 32nd section of the statute, to lay pipes under public footpaths, not confined to footpaths running by the side of public highways, but extending to footpaths leading across fields or other enclosed grounds, over which the public had a right of way; that in passing the act, the Legislature had two distinct objects in view: *first*, to enable the Company to provide a supply of water for the inhabitants of certain parishes therein named; and *secondly*, to distribute the water for the use of such inhabitants; that, by the 32nd section, the Company had an authority to lay pipes under all public footpaths, whether they ran across fields, or by the side of public roads.

Mr. Serjeant *Taddy* now shewed cause.—The sole question turns on the construction of the 47 *Geo.* 3, which contemplates two modes by which the Company are to be empowered to enter on the lands or property of others, so as to make it useful or beneficial to the Company, for the purpose of supplying the inhabitants of particular districts with water,—*viz.* the one with the consent of the owner, proprietor, or occupier, and the other without such consent, or, in other terms, the consent in the one case was to be voluntary, in the other compulsive. The 32nd and 34th sections must be taken together. By the 32nd, the Company are empowered to dig and break up the soil and pavement of any of the roads, highways, *footways*, commons, streets, lanes, alleys, passages and *public places*, within and near certain parishes; and the 34th provides that they shall not enter into or upon the *private* lands and grounds of any person without the consent of the owner,

proprietor, or occupier thereof, or into or upon any *commons* or waste lands, without the consent of the lord of the manor, or other owner or owners thereof. *Private* lands and grounds in the 34th section are, therefore, opposed to or distinguished from *public* places in the 32nd, which do not extend to *private or enclosed* fields. As to the power given to the Company to take lands compulsorily, and against the consent of the owner, the 41st section states, that a map or plan had been deposited with the clerks of the peace for *Middlesex* and *Essex*, which was to remain in their custody, and to be open to inspection to all persons interested; and enacts that the Company should not make any other reservoirs, &c. than the reservoirs &c., in the plan described, nor, in making the said reservoirs, &c. deviate more than twenty yards from the place, line, or course, described in the plan, without the consent of the persons, in, through, or upon whose lands any such reservoir should be erected, or such deviation made. The object of that section, therefore, was to delineate and point out the course for reservoirs and aqueducts, from which the Company could not *deviate* without the consent of the proprietors of the land, although they might cause such reservoirs to be erected according to the plan, without such consent; and although they might dig and break up the soil of *highways*, *footways*, and *public places*, by virtue of the 32nd section, yet they were prohibited from so doing in *private* grounds without the consent of the proprietor, according to the provision contained in the 34th section. The spirit and object of the act appears to be, *first*, to apprise the public of the line of aqueducts, and where the reservoirs were to be made; *secondly*, that the Company should not deviate from the course or line laid down in the plan, without the consent of the proprietors of the land; and *lastly*, that if minor branches were requisite for the purpose of carrying on the works, the Company could only break up the soil of footways in *public* places, and could not en-

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ter on the *private* lands of another without his consent, although the public might have a right of way over such lands.

Mr. Serjeant *Wilde*, in support of the rule.—The object of the statute was to supply with water the inhabitants of a new and increasing district, which at the time of passing the act was not built on; and the water was to be supplied according to the erection of houses, and the increase of population. A stock or supply of water was the first thing to be provided for (on which the question mainly depends), and the 32nd section has two objects in view; the first to authorise the Company to make and maintain aqueducts, reservoirs, and other works necessary for the purposes of the act, and to supply the works with water, and to make so many feeders, and set up so many sluices &c., for supplying, maintaining, and using, such waterworks as the Company should from time to time think proper and expedient. They were therefore empowered to make aqueducts, as well as reservoirs to contain and preserve the water, and no restriction whatever was imposed on them as to the mode of its distribution; for by the latter part of the section it is enacted, that, for the purpose of distributing such water to the different inhabitants, it should be lawful for the Company and their agents, to dig and break up the soil of any of the roads, highways, *footways*, and public places, within and near the parishes mentioned in that section; and there is no clause in the act which limits or tends to operate in restraint of the latter part of that section. The 34th applies to the stock of the Company, *viz.* aqueducts, or other works, for the supplying of water, which cannot be made or erected without the consent of the owners of the land. The 41st section, which requires the plan to remain in the custody of the clerks of the peace, extends only to the works which were then in contemplation; and it is a necessary

inference, that the stock of water would be near the main supply. Taking, therefore, these three clauses together, neither the 34th nor 41st applies to the latter part of the 32nd, the words of which are sufficient to give the defendants the right to enter the plaintiff's closes, for the purposes of the act; and more particularly so, as the Company were thereby authorised to supply water wherever buildings might be erected after the passing of the act. There is no clause to fix the price in case of a difference between the Company and the owners or occupiers of lands. In all places where the public had acquired a right of way, and there had been a sufficient dedication, the Company had a right to lay pipes commensurate with such dedication, provided it fell within a certain district. No valid distinction can be drawn between a footway across a field, and one by the side of a highway; and the owners of the soil may have as large a right under a highway as under a footway, as far as minerals, &c. are concerned. Public easements must be enjoyed without interruption, and it is quite clear that the public had equally a right to the footway in question, as to any other way; and the words of the statute denote and embrace every possible way that may have been dedicated to the public, and over which they have a right of passage. The Company might even make aqueducts, or lay their pipes over commons, with the consent of the lord of the manor; and if the rights of the public extend to a footway by the side of a highway, they equally apply to the way in question. Taking, therefore, the whole of the statute together, the 34th clause extends only to the former part of the 32nd; the latter of which embraces the way in question, although it ran through enclosed fields; and the right of way was clearly established at the trial.

Lord Chief Justice BEST.—I felt no difficulty, when this point was raised at the trial, but I reserved it for the consideration of the Court, as it was said, that the Company

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could not carry on their works, unless they were authorized in acting as they had done, by entering the plaintiff's land for the purpose of laying down their pipes; and, as I was told that, if their right were negatived in this instance, they would be compelled to apply to Parliament for a new act, I preferred that they should go there with the opinion of the whole Court, rather than with mine alone. But I still think, that, under the circumstances, this is a very clear point; and the Company may go to Parliament, if they think proper. The public had no other right than that of passing and repassing on foot on a certain track through the plaintiff's land, and, subject to that right, and to that alone, the right of soil was in the plaintiff; and he might make any use of it he might think proper: he might excavate below it, or dig for minerals. It appeared, that he had separated a piece of land into four fields, and that, for his own convenience, he had laid down pipes to convey water from a pond in one of them to the other three, for the purpose of watering his cattle; and these pipes were destroyed by the works of the defendants. They did not enter the closes for the mere purpose of passing along the footway, but actually destroyed the plaintiff's gates and pipes, and dug up his soil to a considerable depth, and laid it on the pasture. The plaintiff has sustained another injury: the water frequently oozes out of the pipes laid down by the Company; and, when it is necessary to repair them, new nuisances must arise; and although the Company would, in such case, be bound to make full satisfaction to the plaintiff for the damage occasioned thereby, yet it has been insisted, that they are entitled to break up his soil, in the first instance, without making him any compensation whatever. There is a wide distinction between public rights in ancient and in modern times; but no private right can be infringed on, unless a full compensation be previously made; and if this could not be required, a bank-

rupt company might enter on the lands of others, and have no funds to compensate them for the injuries done. Those persons who enter such lands under a local act of Parliament, must shew that they have a clear authority so to do; and if the words of the act be ambiguous or doubtful, every presumption must be made against the powers of the Company, and in favour of individuals; and the Court are bound to protect the rights of the latter. Now, on looking at this statute, let us see whether it be clear that the defendants had a right to enter the plaintiff's fields for the purpose of laying down their mains and pipes. They did not even make out such a right under the 32d section, on which they mainly relied. They were entitled to dig and break up soil for the purpose of *distributing* the water. That means—for the distribution of water to the inhabitants of houses contiguous to the pipes, and not for carrying the water over all the districts named in that section. What, then, are the Company empowered to do? To dig and break up *the soil and pavement* of any of the roads, *highways, footways*, commons, streets, lanes, alleys, passages, and *public places*, within, adjacent, and near unto, the parishes, townships, hamlets, and places, enumerated in that section. Looking, therefore, to the powers of the Company, and the words by which the word "*footways*" is surrounded, such word must not be taken to mean footways over *private* lands, but merely footways, or alleys in towns, or such other ways as are in their nature public, and under which the pipes might be laid without the consent of the owner or proprietor. It has been said, that the 32d section consists of two parts, and that the proviso contained in the 34th applies only to the former part of the 32d. That, however, appears to me to be inconsistent; and although the statute is drawn in a very bungling manner, yet the 32d and 34th sections must be taken together; and the proviso in the latter restrains the operation of the 32d, or enacting,

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clause, and applies to the whole of it. It is expressly provided, that nothing in the act contained shall authorize the Company of proprietors to make any aqueduct, &c. across or over, or to enter into or upon, the *private* lands and grounds of any person, without the consent of the owner, proprietor, or occupier; it, therefore, restrains the Company from breaking up footways on *private* property, without the consent of the owner, although they are authorized to do so in public places. Here, when the defendants destroyed the plaintiff's gates, they were without the reach of the 32d clause, as it did not extend to a footway in enclosed lands; and the Legislature, in passing the statute, did not intend that any private right should be infringed on. Besides, the Company cannot even enter on *commons* or commonable lands or fields, without the consent of the lord of the manor, or owner. That appears to me to remove every possible doubt on the subject, and shews to demonstration, that *private* rights were to be protected. On the whole, therefore, I am of opinion, that this action was properly brought, and that the plaintiff is entitled to recover a full compensation for the damages he has sustained by the acts of the defendants, who had no right to enter and lay their pipes on his lands without his previous consent or approbation.

Mr. Justice PARK.—When this rule was moved for in the course of the last Term, I entertained but little doubt as to its result; but, in the absence of my Lord Chief Justice, who had reserved the point, we thought it right to accede to the defendants' application. I am now, however, clearly of opinion, that there is no validity in the objections which have been raised to the plaintiff's right to recover. It is a safe and wise rule to put a strict construction on statutes whereby the rights or liberties of the subject are invaded. There appears to me to be no inconsistency in the 32d clause. With respect to the word 'foot-

ways,' it must be taken with those by which it is associated, according to the well known maxim, "*Noscitur a sociis;*" and that section has no reference whatever to private rights. The Company are merely empowered, for the purpose of *distributing* the water, to dig up the *soil and pavement* of any roads, highways, *footways*, streets, alleys, passages, and *public places;* which clearly shews the intention of the Legislature: and although it has been contended that the 34th is a separate and independent clause, or, at most, refers only to the former part of the 32d, I am of a different opinion. Although there is an intervening section, it appears to me, that the 32d and 34th sections must be read together as one clause, the 32nd as the enacting part, and the 34th as the proviso, limiting the application of the former. The object of the statute was to enable the Company to dig up highways, streets, alleys, and *public* places; and if we were to put the construction on it as now contended for, they would be enabled to invade *private* property. There is nothing throughout the whole of the act, which shews that they were authorized to make aqueducts for the *supply of water* across or over, or to enter on, the private lands of another, without his consent; but here the defendants entered the plaintiff's fields for the purpose of such supply, and not for the *distribution* of the water; and if even they had a right to dig up the footway, they had no power to break down the gates, or cut through the fields. In the case of a *common*, or commonable lands, the Company have no right to enter, without the previous consent of the lord of the manor, or other owner. In that case, the injury done might be trifling or immaterial. As, therefore, the defendants broke into the plaintiff's private property for the purpose of *supplying* water, without his consent, and considering that the 32d and 34th sections must be taken together, I am clearly of opinion that he is entitled to recover.

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Mr. Justice BURROUGH.—If the general purview of the act be looked at, its meaning appears to me to be perfectly clear and intelligible. It begins by reciting, that the inhabitants of certain parishes, &c., had not a sufficient supply of good and wholesome water, and that as the said parishes, &c., were become very populous, and the number of houses and buildings within the same had of late years greatly increased, the inhabitants thereof would, in case of accidents by fire, be exposed to the most calamitous losses, unless more effectual provisions were made for furnishing them with an additional *supply* of water. The Company, therefore, was established for making and maintaining water-works, aqueducts, &c. &c., for the purposes of such *supply*; and it appears to me, that the word 'footways' in the 32d section must be taken to apply to *footways* running by the sides of houses, which the Company were empowered to break up for the purpose of *distributing* the water, but they were not justified in entering *private* lands at a distance in order to supply it; and if so, the word *footways* must be confined to footways in streets or highways, or immediately adjacent to the houses or buildings for which a supply of water might be required.

Mr. Justice GASELEE.—I am of opinion that the proviso contained in the 34th section cannot be confined to the first part of the 32d, but that it applies to the whole of it; and if so, it is quite clear that the Company had no right to enter into any *private* lands or grounds, to make any aqueduct or other works for the *supply* of water, without the previous consent of the owner or occupier. This rule, therefore, must be—

Discharged.

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Friday, Jan. 25th.

GREGORY *v.* HARMAN and Another.

The plaintiff and three others, being residuary legatees under the will of one *T. P.*, the defendants, as the executors named in the will, accounted with them, and having paid to the latter the respective sums due to them thereon, took from them, and from the plaintiff, a release, but did not pay the plaintiff his share, he having consented to allow it to remain in their hands: —Held, that the money not being retained by the defendants in their character of executors, the plaintiff was entitled to recover it in an action at law.

THIS was an action of *assumpsit*. The *first* count of the declaration stated, that on the 15th *April*, 1820, one *Thomas Pattrick* made and published his will, and thereby directed that all his just debts &c. should be paid, and he nominated and appointed the defendants his executors, and bequeathed to each of them 200*l.* for their trouble; he then devised and bequeathed all and every his freehold, copyhold, and leasehold messuages, farms, lands, &c. to the use of the defendants, their heirs, executors, &c., upon trust, that the trustees (the defendants), or the survivor of them, his heirs, executors, &c., should, with all convenient speed after his (testator's) decease, sell and dispose of his said real estates for the best price that could be got for the same, and he directed that the proceeds of the sale should form part of his personal estate, and be applied accordingly: the testator then, after giving divers pecuniary legacies, gave and bequeathed all the rest, residue, and remainder of his personal estate and effects, to *Mary Gregory*, and her two daughters, *Sarah* and *Clarissa*, and her son (the plaintiff), equally between them, share and share alike.—The plaintiff then averred, that the testator, *Thomas Pattrick*, died on the 4th *May*, 1820, without revoking or altering his will; that the defendants, on the 8th *June* following, proved it, and took upon themselves the burthen of the execution thereof, and assented to the bequest to the plaintiff of the share of the residue of the personal estate of *Thomas Pattrick;* that after the defendants had paid the debts and the several legacies mentioned in the will, there remained in the hands of the defendants, the sum of 13,243*l.* 3*s.* 0*d.* as the residue and remainder of the personal estate of *Pattrick;* that the defendants afterwards, to wit, on the 3d *March*, 1821, assented and agreed, that the plaintiff was entitled

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to one fourth part or share of that sum, to wit, the sum of 3,310*l.* 15*s.* 9*d.*, according to the said bequest, and thereupon, in consideration thereof, and also in consideration that the plaintiff, at the special instance and request of the defendants, would suffer and permit them to retain the said last mentioned sum, and would lend the same to them, they undertook, and promised the plaintiff, to pay him such sum on request; and that he, confiding, &c., did permit the defendants to retain that sum, and lent the same to them: and assigned for breach, the non-payment thereof.—The *second* count stated, that in consideration that the plaintiff would permit the defendants to retain the said sum of 3,310*l.* 15*s.* 9*d.*, being the fourth part of the residue of the personal estate of *Pattrick*, bequeathed to the plaintiff, and lend the same to the defendants, they promised the plaintiff to pay it him within a reasonable time then next following; and assigned for breach, that they refused to do so, and that such sum still remained wholly due and unpaid to the plaintiff. To these were added the common money counts. The defendants pleaded the general issue.

At the trial, before Mr. Justice *Burrough*, at *Guildhall*, at the Sittings after the last Term, it appeared, that *Pattrick* died in *May*, 1820; that his will was proved by the defendants, as his executors, on the 8th *June* following; that, on the 3d *March*, 1821, they rendered an account to the four residuary legatees, of whom the plaintiff was one, stating, that they had paid the duty on the residuary property, at the *Stamp Office*, on 14,504*l.* 0*s.* 4*d.*, amounting to 1,450*l.* 8*s.*; that the plaintiff's one fourth share or part of the clear residue of the testator's real and personal estate, amounted to 3,310*l.* 15*s.* 9*d.*; that the defendants accordingly debited themselves with that sum, in favour of the plaintiff; that his mother and two sisters received their several proportions; and that, in the month of *July* following, they all executed

a general release to the defendants, as executors. It also appeared, that, shortly after the account was rendered by the defendants, *viz.* on the 22d *March*, 1821, a commission of bankrupt issued against the plaintiff, which was superseded in the month of *August*, 1827, on the ground, that there was no sufficient petitioning creditor's debt. Notice was then given to the defendants, by other creditors of the plaintiff, not to pay him over the money remaining in their hands, as a second commission was about to be sued out against him;—and as they refused to pay it without an indemnity, the present action was commenced.—The learned Judge was of opinion, that, under these circumstances, the defendants were liable to the plaintiff for the principal sum sought to be recovered, as it remained in their hands after they had rendered the account to the residuary legatees, by which it appeared that the affairs of their testator had been settled; and he left it to the Jury to say what rate of interest the plaintiff was entitled to recover, whether five, four, or three, *per cent.* They found a verdict for the plaintiff, for 4,454*l.* 3*s.* 5*d.*, being the amount of the principal sum, with interest at 5 *per cent.*, from the 3d *March*, 1821, when the account was rendered.

Mr. Serjeant *Taddy* now applied for a rule *nisi*, that this verdict might be set aside, and a nonsuit entered, or a new trial granted; and submitted, in the *first* place, that the action could not be maintained. The case of *Deeks* v. *Strutt* (*a*), expressly decides, that no action at law can be maintained for a legacy; and Lord *Kenyon* there said (*b*), "the arguments which have of late years been advanced in support of such an action, are founded on the supposed justice of the case, and the convenience of the parties; but when it is considered in what manner a Court of Equity interposes in suits for legacies, in taking

(*a*) 5 Term Rep. 690. (*b*) Id. 692.

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care that provision is made for the different parties entitled, and what inconvenience and even ruin to private families would have ensued from determining that an action can be brought in a Court of Law for a legacy, I think that those who have wished to support the action in a Common Law Court, would hesitate before they came to the conclusion that the action can be maintained. If an action will lie for a legacy, no terms can be imposed on the party who is entitled to recover; and therefore, when the legacy is given to a wife, the husband would recover at law, and no provision could be made for the wife or family; whereas, a Court of Equity will take care to make some provision for the wife in such a case. But the whole of this admirable system, which has been founded in a Court of Equity, will fall to the ground, if a Court of Law can enforce the payment of a legacy." That reasoning is particularly applicable to the present case. There was no sufficient evidence of a contract between the plaintiff and defendants to repel the presumption of law that the plaintiff's proportion of the residuary estate of *Pattrick* remained in the defendants' hands in their character of executors; and although the plaintiff executed a release after the account had been rendered, yet he did so in the expectation of receiving the money. No contract was proved, to shew that the defendants were liable to the plaintiff in their own right; and the release was only given to them in their character of executors. Besides, a commission of bankrupt was issued against the plaintiff shortly after the account was rendered, and continued in force till *August* last, when some of his creditors gave the defendants notice that a second commission was about to be sued out. They were, therefore, clearly entitled to retain the money in their hands until they had obtained a sufficient indemnity from the plaintiff. *Secondly*, even supposing the action to be maintainable, the plaintiff could not be entitled to recover interest on the money in the defendant's hands at the rate of *5 per cent.*, but

only to the amount of the profit the defendants themselves had actually made of it from the time the account was rendered; and it did not appear at the trial, that they had made more than 3 *per cent.*

Lord Chief Justice BEST.—I am clearly of opinion, that, under the circumstances, the present action is maintainable; and, by so holding, we shall not disturb any of the decisions that have established that no action at law will lie against an executor for the payment of a legacy, he acting as such, and retaining the sum in his hands as a trustee for the party entitled to receive it. The remedy of the legatee in such case is by an application to a Court of Equity. Here, however, it appears, that since *March*, 1821, the defendants ceased to hold, as executors, the principal sum sought to be recovered in this action, and that thenceforth they held it by way of loan; and there was abundant evidence to shew that the plaintiff was entitled to recover on an account stated. When the account was rendered, the defendants stated that they had paid the duty on the residuary property, at the *Stamp Office;* and they shortly afterwards took a general release from the plaintiff and the other residuary legatees, which discharged them from their duties as executors. From that time, they could only hold the sum stated to be due to the plaintiff as a loan, he being the only party entitled to receive it, as the three other residuary legatees, *viz.* his mother and sisters, had been paid their proportions. It has been said, however, that the defendants did not hold the sum in question by way of loan; and that they could not safely have paid it over to the plaintiff without an indemnity. That, however, forms no excuse, for the indemnity was not required until long after the account had been rendered, and the release executed; which is another strong circumstance to shew that they did not retain the money in their character of executors. It is true, that it would have been a hardship on them if they could have been compelled to pay twice, which might have

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been the case, if the plaintiff had committed an act of bankruptcy, and the commission issued against him could have been supported; but, at the time of the demand, the commission had been superseded; and although it has been said, that some of his creditors had given the defendants notice that they intended to sue out a second, yet, if those creditors had commenced proceedings against the defendants, they might have applied to the Court to stay them; and there appears to me to be no ground whatever for the defendants' withholding the principal sum due to the plaintiff, from the mere apprehension of a second commission. With respect to the interest, it was purely a question for the consideration of the Jury. It has been admitted, that the defendants made 3 *per cent.*, they might have made 5 *per cent.*, and no doubt they expected to have made even more than that. They cannot now play fast and loose; and as the principal sum remained in their hands for seven years, by way of loan, I cannot say that the Jury have done wrong, in allowing the plaintiff the interest they have awarded him.

Mr. Justice PARK.—I am of the same opinion; and it appears to me that there is nothing to induce us to disturb the verdict found by the Jury. They no doubt thought that the defendants' conduct had been most outrageous; even the first commission of bankrupt was not issued against the plaintiff, until after the defendants had rendered their account as executors. They certainly ought to have discharged it in the mean time, they having held the plaintiff's residuary share for more than seven years before the action was commenced. They stated in the account rendered, that they had paid the amount of the legacy duty at the *Stamp Office*. That shews that the accounts of their testator had been adjusted and settled; and they afterwards retained the sum due to the plaintiff, as one of the residuary legatees, by way of loan, and with his assent. The

mere apprehension of a second commission being about to be issued against him, can furnish no defence to this action; and as the plaintiff was entitled to recover under the counts for money lent, or money had and received by the defendants to his use, it was for the Jury to say what compensation the plaintiff was entitled to receive by way of interest.

Mr. Justice BURROUGH.—I was fully aware at the trial of the case of *Deeks* v. *Strutt*, but I thought it had nothing to do with the present, as the defendants had rendered an account to the plaintiff at the expiration of a year from the death of their testator, and had actually paid the three other legatees the sums due for their several proportions. Although it has been said that the plaintiff's share remained in their hands as executors, yet they used it as their own; and I left it to the Jury to say, what interest the plaintiff was entitled to recover, and I have no reason to be dissatisfied with their finding.

Mr. Justice GASELEE.—The reasoning of Lord *Kenyon* in *Deeks* v. *Strutt*, does not appear to me to apply. His Lordship there merely expressed himself as to the general policy of the law; but if it were a general principle that no action could in any event be maintained for a legacy, many subsequent decisions could not be supported; and it is quite clear that an action lies against an executor to recover a specific chattel bequeathed, after his assent to the bequest (*a*). Here, however, the defendants rendered an account in due course after the death of their testator, and procured a general release from the plaintiff and the other residuary legatees, discharging them from their duties and responsibilities as

(*a*) *Doe* d. Lord *Saye and Sele* v. *Guy*, 3 East, 120; *S. C.* 4 Esp. Rep. 154.

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executors. It appears to me that the question as to what interest the plaintiff was entitled to recover, was most properly left to the Jury, and that they have drawn a right conclusion.

Rule refused.

Friday, Jan. 25th.

DE VAUX and Another *v.* SEWELL.

A serjeant-at-mace of the city of *London*, received a mandate from the *Mayor's Court*, to arrest *A. B.* and *C. D.* His deputy arrested *A. B.*, (*C. D.* being out of the country), and took him to a lock-up-house, the keeper of which allowed him to go at large. Two responsible persons were afterwards tendered to the clerk of the bails of the *Mayor's Court*, for *A. B.*, whom he refused to receive, unless they would become bail for *C. D.* also; it being the practice of that Court, if two or more persons be sued jointly, and one only be arrested, to require, from that one, bail for all. In an action, by the parties who had obtained the mandate against the serjeant-at-mace for the escape of *A. B.*:—Held, that he was liable, as he was bound to keep him in safe custody; and that the refusal of the officer to take the bail was no answer to the action.

THIS was an action on the case for an escape.—The *first* count of the declaration stated, that one *Nathaniel Goldstein* and one *Alexander Cohen Castle*, heretofore, to wit, on the 3d *October*, 1827, at *London*, were indebted to the plaintiffs in the sum of 1,200*l.*, upon and in respect of certain causes of action before then accrued to the plaintiffs against *Goldstein* and *Castle*, within the jurisdiction of the Court thereinafter next mentioned; and that, they being so indebted, the plaintiffs, for the recovery of their said debt, afterwards, to wit, on &c., at &c., according to the course and practice of his Majesty's Court, before the Mayor and Aldermen of the city of *London*, in the Chamber of the *Guildhall* of the same city, duly caused an affidavit of the said debt to be made in the said Court, and thereupon, then and there, according to the course and practice of the said Court, duly affirmed their bill original, against *Goldstein* and *Castle*, for the said debt, and afterwards, to wit, on &c., sued and prosecuted out of his said Majesty's Court, before the Mayor, &c., against *Goldstein* and *Castle*, according to the course and practice of the said Court, a certain mandate directed to the defendant, then and there being one of the serjeants-at-mace of the said Court, as such serjeant, or to any other serjeant-at-mace of the said Court: by which said mandate the defendant was commanded to arrest *Goldstein* and *Castle*, at the suit of the plaintiffs, according to the custom

of the said Court; which said mandate was duly marked for bail for 1,069*l.* By virtue of which said mandate, the defendant, so being serjeant-at-mace as aforesaid, took and arrested *Goldstein* by his body, and had and detained him in custody, as such serjeant-at-mace, at the suit of the plaintiffs, for the cause aforesaid;—yet, that the defendant, so being such serjeant-at-mace of the said city of *London*, not regarding the duty of his office as such, but wrongfully and unjustly contriving and intending to injure the plaintiffs, and hinder them in and from the recovery of their said debt, afterwards, to wit, on &c., at *London*, &c., without the leave or licence, and against the will of the plaintiffs, voluntarily suffered and permitted *Goldstein* to escape and go at large wheresoever he would out of the custody of the defendant, so being such serjeant-at-mace; the said debt, for which *Goldstein* was so arrested as aforesaid, and every part thereof, then and still being wholly unpaid to the plaintiffs. The plaintiffs then averred, that *Goldstein did not appear in the said Court of the said Mayor, according to the practice of the said Court*, but therein wholly failed and made default, *by means of which said premises* the plaintiffs had been and were *greatly injured and delayed* in the recovery of their said debt, and were likely to lose the same, and thereby also had lost and been deprived of the means of recovering their costs and charges by them paid, laid out, and expended, in and about their said suit so commenced and prosecuted as aforesaid, amounting together to a large sum, to wit, the sum of 20*l.* The *second* count stated, that the defendant, as serjeant-at-mace, might have taken and arrested *Goldstein*; but that he did not do so, and that *Goldstein* did not appear in the *Mayor's Court* at the return of the process, or at any other time; whereby the plaintiffs had been and were greatly *injured and delayed*, &c. as in the first count.—The *third* count stated, that the defendant arrested *Goldstein*, and detained him in his custody, as serjeant-at-mace, at the suit of the plaintiffs, but voluntarily suffered and permitted

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him to escape, and go at large:—and the *fourth* count stated, that the defendant neglected to arrest *Goldstein*, although he had an opportunity of so doing. Plea—Not guilty.

At the trial, before Mr. Justice *Gaselee*, at *Guildhall*, at the Sittings after the last Term, it appeared that the plaintiffs commenced proceedings in the *Lord Mayor's Court*, against two persons trading under the name of *Goldstein, Castle, & Co.*, for money due to the plaintiffs on certain bills of exchange, of which they were the holders, and which were accepted by *Goldstein* and *Castle;* that a mandate was, in due course, made out to the defendant, as one of the serjeants-at-mace, directing him to arrest *Goldstein* and *Castle*, at the suit of the plaintiffs, for the sum of 1,069*l.*; that the mandate was afterwards placed in the hands of an assistant, and duly sworn deputy, of the defendant, who, on the 4th *October* last, arrested *Goldstein*, and took him to a lock-up house kept by an officer of the Sheriffs of *London*, directing him not to let him (*Goldstein*) out, as he expected several detainers against him; and that on the following day *Goldstein* was seen at large in *Lombard-street*. It also appeared, that on the 8th *October*, *Goldstein* tendered two respectable persons as bail, at the *Lord Mayor's Court Office*, but that the clerk of the bails refused to take a recognizance of bail for *Goldstein* alone, as, by the custom and practice of that Court, if process be issued against two parties jointly, and one be arrested, he is bound to put in bail for both; and the persons offered as bail for *Goldstein* having refused to become bail for his partner, *Castle*, no bail was put in; and shortly afterwards a commission of bankrupt was issued against *Goldstein*, who continued at large.—Under these circumstances, the learned Judge was of opinion, that the defendant was not discharged from his liability to the plaintiffs, by his deputy's having taken *Goldstein* to a lock-up house; and he was strongly inclined to think, that the practice of the *Lord Mayor's Court*, as

to requiring bail to be put in for two or more parties, when one only is arrested, was bad; but said that the defendant had his remedy against the officer, and therefore, that it would not affect the plaintiffs' right to recover against him in this action; and he left it to the Jury to say to what damages the plaintiffs were entitled. They returned a verdict for them for 40*s.*, leave being reserved to the defendant to move to set it aside, and that a nonsuit might be entered, in case the Court should be of opinion that the action could not be maintained.

Mr. Serjeant *Wilde* now applied accordingly, and submitted, that the defendant had done his duty by having caused *Goldstein* to be placed in a lock-up house under the mandate directed to him for his arrest; and that, at all events, the declaration could not be supported, as it averred that *Goldstein* did not appear in the Court of the Mayor, according to the practice of that Court, by means of which the plaintiffs had been delayed in the recovery of their debt; and it was proved, that he not only appeared, but offered two responsible persons to become bail for him; and if a sheriff allow a party arrested to go out of his custody without putting in bail, and they are put in in due time, it is sufficient. So, if a party return into custody before the return of the writ, an action for an escape cannot be maintained against the sheriff. Here, the plaintiffs' having been delayed in the recovery of their debt, must depend on one of two facts, *viz.* the escape of *Goldstein*, or his not appearing in the *Mayor's Court;* and they having averred that they were delayed by *means of the premises*, these latter words can only apply to the last antecedent, *viz.* the non-appearance of *Goldstein*, which cannot be attributed to the negligence of the defendant, but to the error of the officer of the Court, who refused to accept the bail tendered for *Goldstein*, although they were proved to be responsible persons. There is a wide distinction between process issuing out of

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this Court, and a mandate from the *Lord Mayor's Court*, as the persons constituting that Court, *viz.* the Mayor and Aldermen, not only appoint its immediate officers, but also the keepers of lock-up houses, which are duly licensed by the Lord Mayor. The non-appearance of *Goldstein* was not the consequence of the escape, nor did it result from it, as he did appear according to the practice of the Court; and bail were not required to be put in on any given day, as the mandate merely directed the defendant to arrest *Goldstein* and *Castle* (*a*). Although it is said, that the reason of requiring bail to be put in for two partners, where one only is arrested, is, that the *Lord Mayor's Court* has no power to proceed to outlawry; yet, if the clerk of the bails had accepted those persons tendered for *Goldstein*, it is quite clear that it would have been sufficient, and, if so, the plaintiffs cannot be entitled to recover as against the defendant in this action.

Lord Chief Justice BEST.—I am of opinion, that there is no foundation for these objections. The action is brought by the plaintiffs against the defendant to recover a compensation for damages they have sustained by his allowing one *Goldstein* to escape out of his custody. What are the facts? The defendant is an officer of the *Lord May-*

(*a*) The mandate was as follows:

In the *Mayor's Court, London.*

To *Charles Sewell*, one of the serjeants-at-mace, or to any other serjeant-at-mace of the said Court. } By the Mayor, &c.

Arrest *Nathaniel Goldstein* and *Alexander Cohen Castle*, defendants, at the suit of *Charles De Vaux* and *Adolphe Debraux*, plaintiffs. } Case, £2000, Sworn, £1069 and upwards.

Thos. N. Williams, plaintiff's attorney.
Lord Mayor's Court Office,
3d *October*, 1827.

or's Court. The process, or mandate, by virtue of which he was required to arrest *Goldstein*, was delivered to him as such officer, and *Goldstein* was taken under it. It was therefore the duty of the defendant to have kept him in safe custody, and brought him into the *Mayor's Court.* It has been said, that lock-up houses in the city of *London* are sanctioned, and that the keepers are licensed, by the Lord Mayor. But the plaintiffs in this suit are only to look to the officer to whom the process was directed, and whose duty it was to keep *Goldstein* in custody; and as he was arrested by the defendant's deputy, the latter might either have remained with *Goldstein* at the lock-up house, or have required an indemnity from the keeper. The officer is to look to the lock-up house keeper, and the plaintiffs in the cause to the officer who made the arrest, and to him alone; and the keeper of the lock-up house must be considered as his deputy. It has been said, however, that *Goldstein* appeared, according to the practice of the *Lord Mayor's Court,* and tendered bail, who ought to have been accepted, and that they were improperly rejected by the officer; but we are not to decide on the practice of another Court, though I confess, it appears to be extraordinary, and calculated to lead to great injustice. But whether the clerk of the bails in the *Lord Mayor's Court* acted rightly or not, still it was the duty of the defendant, on the bail being rejected, to take back *Goldstein* to the lock-up house. He, however, not only allowed him to go at large in the first instance, but did not have him ready in the *Mayor's Court* when he ought, by which the plaintiffs have clearly been delayed; and such delay must be attributed to the defendant, as the officer of that Court. His deputy should either have kept *Goldstein* in his own custody, or taken him back to the lock-up house, where he improperly left him, under the care of the keeper; and if the clerk of the bails in the *Mayor's Court* has acted improperly, the defendant may have his remedy against him.

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Mr. Justice PARK.—Why did not the defendant cause *Goldstein* to be retaken, when he found that the bail tendered for him were rejected? With respect to the objection as to the insufficiency of the averment in the declaration, there appears to me to be no foundation for it, although I felt a difficulty at first, as it is quite clear that the plaintiffs have, in point of law, been delayed by the negligence or misconduct of the defendant.

Mr. Justice BURROUGH.—*Goldstein*, the defendant in the original suit, was in the actual custody of the defendant's officer or deputy; and although he caused him to be locked up, yet, in the eye of the law, he must be considered as in his personal custody, and he ought to have detained him till bail was duly put in.

Mr. Justice GASELEE.—It was clearly proved, that the plaintiffs had been delayed in the recovery of their debt as against *Goldstein*, by his having been allowed to escape from the lock-up house, as he shortly afterwards became a bankrupt. Although, by the Lords' Act (*32 Geo. 2*, c. 28, s. 1), a serjeant-at-mace, or sheriff's officer, cannot carry his prisoner to gaol within twenty-four hours after his arrest, unless he shall refuse to be carried to some safe house of his own appointment; yet the sheriff or such officer will not be relieved from his responsibility; and if they wish to avail themselves of the security of a lock-up house, they should require an indemnity from the keeper; and I do not think that the defendant did his duty by merely causing *Goldstein* to be placed in such a house, on his being arrested at the suit of the plaintiffs.

Rule refused.

1828.

Saturday, Jan. 26th.

BURDEN *v.* HALTON.

In an action for goods sold, it appeared that the defendant had accepted two bills of exchange drawn on him by the plaintiff, which covered the amount of his demand; that the plaintiff had indorsed these bills to Messrs. *A.* and *B.*; and that they were dishonoured by the defendant, and were in the possession of the indorsees at the time of the commencement of the action; but that the plaintiff sent his servant to them with a letter, a fortnight or three weeks before the trial, and that they gave him the bills, which he brought to the plaintiff:—Held, that as the bills were in the plaintiff's possession at the time of the trial, he was entitled to recover for his original demand.

THIS was an action of *assumpsit*, brought to recover the sum of 333*l.* 13*s.*, being the alleged balance of an account due from the defendant, a tailor, to the plaintiff, an embroiderer, for gold and silver lace supplied by the latter to the former. The *first* count of the declaration was on a bill of exchange for 40*l.* 6*s.* 6*d.*, drawn on the 22nd *May*, 1827, by one *Haynes*, upon, and accepted by one *Fullam*, at three months after date, payable to *Haynes's* order, and indorsed by him to the defendant, who indorsed it to the plaintiff. There were also counts for goods sold and delivered, for work and labour, and the common money counts. At the trial, before Mr. Justice *Burrough*, at *Westminster*, at the adjourned Sittings after the last Term, it appeared, that a balance being due from the defendant to the plaintiff, for goods sold, the defendant had accepted two bills, the one for 100*l.*, and the other for 146*l.*, drawn on him by the plaintiff, in part payment, which bills were dishonoured by the defendant, but were not in the hands of the plaintiff at the time this action was commenced, they having been indorsed by him to Messrs. *Brown* and *Brind;* and that, about a fortnight or three weeks before the trial, the plaintiff sent a clerk or servant to them, who returned to his employer with the bills; but on his being called as a witness he stated, that when he went for them he took no money, but only a sealed letter or note, the contents of which he did not know; and there was no evidence to shew when or how the bills got into the hands of *Brown* and *Brind*, or whether or not the plaintiff had taken them up.

For the defendant, it was contended that as Messrs. *Brown* and *Brind* appeared to have been in possession of the bills at the time the action was commenced, the plaintiff could neither recover on the bills, nor resort to his original demand; as, in case the defendant were

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sued by *Brown* and *Brind*, the indorsees, he might be subjected twice to the payment of the same demand. The learned Judge, however, was of opinion, that the plaintiff was entitled to recover; and the Jury found a verdict for him for 237*l.* 15*s.*, being the amount due at the time the action was brought, deducting a portion of the original demand, the credit on which had not expired.

Mr. Serjeant *Jones*, now applied for a rule *nisi*, that this verdict might be set aside, and a new trial granted, on the ground that the bills given by the defendant to the plaintiff were not in the possession of the latter at the time the action was brought; and that, as he had indorsed them, and as they were then in the hands of third persons, the defendant could not be liable to the plaintiff for their amount, unless he had shewn that he had taken them up; as the defendant might still continue responsible to the holders or indorsees. If a party receive a bill or negotiable instrument payable to his order, and pass it to the world, he must account for it, either by shewing that it was in his possession, or that he was entitled to sue on it at the time of the commencement of an action to recover the consideration for which such bill was originally given. In *Dangerfield* v. *Wilby* (*a*), where the declaration contained a count upon a promissory note made by the defendant, payable to the plaintiff, and the money counts, and at the trial the note was stated to have been lost, though no evidence of that fact was offered; but it was proved, that, on the money being demanded, the defendant had apologized for not having paid the money on account of the note,—it was contended for the plaintiff, that the note was only evidence of the consideration (which was stated to have been money lent), and that he might abandon the note and go for the consideration. But Lord *Ellenborough* said, that as the note, for any thing that ap-

(*a*) 4 Esp. Rep. 159

peared in evidence, was in existence, it might still be in circulation, and the defendant be liable to be called upon to pay it; so that he might be subjected twice to the payment of the same demand; and that, without proving the note to have been lost, the plaintiff was not entitled to recover. So here, the bills given by the defendant being more than sufficient to cover the whole balance due on the account, the plaintiff, before he could be entitled to recover, ought to have shewn that the bills were not outstanding, or that he had taken them up; and according to *Peacock* v. *Morgan* (*a*), a payment by a negotiable security must be considered as a satisfaction, until the contrary be shewn; on the ground, that the acceptance of such security is *primâ facie* evidence of satisfaction, rendering it necessary that the party receiving it should account for it before he can be entitled to recover the consideration for which it was given; and here, if the plaintiff had become bankrupt, and his assignees had sued the defendant, they could only have recovered on the outstanding bills, as between the plaintiff and *Brown* and *Brind*, and could not have brought an action for the goods sold, without proving that the bills had been taken up by the plaintiff, or that they were in his custody at the time the action was commenced.

Lord Chief Justice BEST.—I am of opinion, that the point insisted on for the defence in this case, has not been properly raised. There was no evidence to shew that, at the time the action was brought, the bills were in the hands of Messrs. *Brown* and *Brind*, or that they had been paid to them for a good or valuable consideration, or sent in course of business; and it is fair to presume that they had not, as no money was given for them, when they were returned to the plaintiff; and it was proved that they

(*a*) 5 Term Rep. 513.

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were in his custody at the time of the trial. If, however, it had been shewn, that the bills were outstanding in the hands of third persons, or indorsees, for a valuable consideration, it would undoubtedly have been a good defence; but they were overdue, and had been dishonoured by the defendant, and although he failed to take them up, he now seeks to take advantage of his own wrong. As, therefore, the plaintiff had the bills in his possession at the trial, the defendant could only be answerable to him, and he did not shew that he had been ever called on for payment by *Brown* and *Brind*.

Mr. Justice PARK concurred.

Mr. Justice BURROUGH.—The bills were overdue, and dishonoured by the defendant as the acceptor, and when the plaintiff had them returned to him from *Brown* and *Brind*, the probability is, that he took them up; and if so, he had a right to recover against the defendant for his original demand. But it did not appear that the plaintiff had ever made any actual use of the bills, or circulated them in the way of trade, and they might have been sent to *Brown* and *Brind* only a few days before they were got back by the plaintiff. He proved the consideration for which they were given, and he had them in his possession before and at the time of the trial.

Mr. Justice GASELEE.—The bills being overdue and unpaid, the plaintiff had a right to resort to his original demand; and it is quite consistent with the evidence, that he might have indorsed the bills to *Brown* and *Brind*, and that, on the defendant's having refused payment, and after the bills were due, the plaintiff might have been called on by them to take them up, and might have required time, for the purpose of seeing whether or not he could obtain payment from the defendant.

Rule refused.

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Monday, Jan. 28th.

SEAGO *v.* DEANE.

THIS was an action of *assumpsit*. The *first* count of the declaration stated—That, on the 1st *January*, 1827, at &c., in consideration that the plaintiff, at the special instance and request of the defendant, would take, and become tenant to the defendant of, a certain house, cottage, and premises, situate and being in the parish of *Streatham*, in the county of *Surrey*, at the yearly rent of 39*l.*, under a lease thereof to be granted to her by the defendant, he, the defendant, undertook and promised the plaintiff to give unto her the sum of 20*l.* to repair the said house; and also, that he would make an opening from the cellar of the said house into *Wandsworth Lane;* and put three stone steps from the said cellar; and make a door in the said house that should open into *Wandsworth Lane*, to enable the plaintiff to take out coals from the said cellar. The plaintiff then averred, that she, confiding &c., did afterwards, to wit, on &c., take, and become tenant to the defendant of, the said house, cottage, and premises, at the said yearly rent of 39*l.*, under a lease thereof granted to her by the defendant; and although the plaintiff did afterwards, and after a reasonable time from the making the promise of the defendant, to wit, on the 10th *April*, 1827, at &c. aforesaid, request the defendant to give her the said sum of 20*l.* to repair the said house, and also to make an opening from the cellar of the said house into *Wandsworth Lane*, and put three stone steps from the said cellar, and make a door that should open into *Wandsworth Lane*, to enable her to take out coals from the said cellar; yet the defendant, not regarding &c., but contriving to injure the plaintiff in that behalf, did not, nor would, when he was so requested as aforesaid, or at any other time, give her the said sum of 20*l.* to repair the said house, or any part thereof; nor did nor would he

The defendant agreed with the plaintiff, by parol, that, if she would take a lease of certain premises belonging to him, he would pay her 20*l.* towards putting them in repair. The lease was afterwards executed and accepted by the plaintiff, who took possession and repaired the premises, and, on payment of the first quarter's rent, demanded the sum of 20*l.* from the defendant, who said he would pay it when the next quarter's rent became due:—Held, that such acknowledgment of that sum being due, raised a moral obligation on the defendant to pay; and that the plaintiff was entitled to recover upon an account stated; although it was objected, that parol evidence, as to the terms on which the lease was to be granted, was inadmissible by the statute of frauds.

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make, nor hath he made, any opening from the cellar of the said house into *Wandsworth Lane;* nor put three stone steps, or any steps, from the said cellar; nor made a door to open into *Wandsworth Lane*, to enable the plaintiff to take out coals from the said cellar, as he so undertook and promised as aforesaid; contrary to his said promise and undertaking, to wit, at &c. aforesaid.

The *second* count stated—That, in consideration that the plaintiff, at the special instance and request of the defendant, would become tenant to the defendant of a certain other house, situate, &c., at the yearly rent of 39*l.*, the defendant undertook and promised the plaintiff to give her the sum of 20*l.* to repair the said house. The plaintiff then averred, that she, confiding &c., did afterwards, to wit, on &c, become tenant to the defendant of the said house, at the said rent; and that although a reasonable time, from the making of the said promise, for the defendant to give the plaintiff the said sum of 20*l.* for the purpose aforesaid, had long since elapsed; and although the plaintiff did afterwards, to wit, on &c., request the defendant to give her the said sum of 20*l.* for the purpose aforesaid; yet the defendant, not regarding &c., but contriving &c., did not, nor would, when he was so requested as aforesaid, or at any time afterwards, give her the said sum of 20*l.* for the purpose aforesaid, or any other purpose, or any part thereof; contrary to his said promise and undertaking.

The *third* count stated—That, in consideration that the plaintiff, at the like special instance and request of the defendant, would become tenant to the defendant of a certain other house, situate, &c., at the yearly rent of 39*l.*, he, the defendant, undertook and promised the plaintiff that he, the defendant, would make an opening from the cellar of the house into *Wandsworth Lane*, and put three stone steps from the said cellar, and make a door into *Wandsworth Lane*, to enable the plaintiff to take coals from the said cellar; and the plaintiff averred, that she,

confiding &c., did become tenant to the defendant of the said house, at the said rent; and that, although a reasonable time, from the making of the promise, for the defendant's performing the same, had long since elapsed; and although the plaintiff did afterwards, to wit, on &c., request the defendant to make an opening from the cellar of the house into *Wandsworth Lane;* and put three stone steps from the said cellar; and make a door into *Wandsworth Lane,* to enable the plaintiff to take out coals from the said cellar; yet the defendant, not regarding, &c., but contriving, &c., did not, nor would, when he was so requested as aforesaid, or at any other time, make, nor hath he made, any opening from the cellar of the said house into *Wandsworth Lane;* nor put three stone steps, or any steps from the said cellar; nor made a door into *Wandsworth Lane,* to enable the plaintiff to take out coals from the said cellar, as he so undertook and promised as aforesaid; contrary to his said promise and undertaking. There were also counts for work and labour and materials, for money paid, and an account stated. The defendant pleaded the general issue.

At the trial, before Mr. Justice *Gaselee,* at *Westminster,* at the Sittings after the last Term, it appeared, that a lease of the premises agreed to be demised by the defendant to the plaintiff was executed on the 28th *February* last, which contained no agreement or stipulation as to the payment of the above sum of 20*l.*, but was granted in consideration of the payment by the plaintiff of the yearly rent of 39*l.*, and the usual covenants to repair, &c. The plaintiff's daughter proved a conversation between her mother and the defendant, in which the latter agreed to grant a lease to the former for twenty-one years, at the rent of 39*l.*, and to make the alterations in the premises, as stated in the declaration; and the plaintiff was to do certain other necessary repairs, for which the defendant agreed to allow her 20*l.*; and that when the

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plaintiff paid the first quarter's rent, she asked the defendant for the 20*l.* he had promised; when he said, that it was not convenient for him to pay it then, as he had experienced many heavy losses, but that he would do so when the next quarter became due. Another witness proved, that in a subsequent conversation between the plaintiff and defendant, the latter said, that the plaintiff could not prove any contract between them, as to the terms on which the lease was to be granted, as no one but her daughter was present at the time, and that she (the daughter) could not be a witness: it was also proved that the plaintiff had done the necessary repairs. Under these circumstances, the learned Judge was of opinion, that, as the defendant had promised to give the plaintiff 20*l.* to put the premises in repair, and she had done so, it might be considered as a contract distinct from, and independent of, the granting of the lease; and that, as he had promised to allow it, after having received the first quarter's rent, the plaintiff was entitled to recover on the account stated.

The Jury accordingly found a verdict for the plaintiff, damages 20*l.*; and leave was reserved to the defendant to move to set it aside, and enter a nonsuit, in case the Court should be of opinion that the evidence, as to the terms of the agreement on which the lease was to be granted, was not admissible.

Mr. Serjeant *Wilde*, now applied accordingly, and submitted, in the *first* place, that there was no evidence adduced by the plaintiff at the trial to support either of the counts of the declaration; and *secondly*, that, if the evidence were sufficient, it had been improperly received, as the terms of the contract for granting the lease could not be proved by parol, it relating to an interest in lands; and that, as the defendant's promise to pay the 20*l.* was not shewn to have been reduced into writing, it was void by the statute of frauds. The lease was executed in consideration of the rent and cove-

nants therein reserved and contained, and there was no covenant by the defendant to make the alterations in the premises, or to pay for the repairs to be done by the tenant on taking possession. At all events, the previous contract was executed by the granting of the lease, and if so no conditions can be added, or imposed on the landlord, which are not contained therein, the contract itself being entire, viz. the granting of a lease. The declaration states that, in consideration that the plaintiff would become tenant to the defendant of a house, at a certain rent, under a lease to be granted to her by the defendant, he promised to give her 20*l.* to repair the house, and to make certain alterations therein. That sum was not to be paid before the lease was granted; but, in consideration that the plaintiff *would* become tenant under a lease, the 20*l.* was to be paid for the repairs. The plaintiff, therefore, was not to become tenant generally, but only under and by virtue of the lease; and as that lease was afterwards executed, the contract was entire, and the whole of it clearly related to an interest in land. This is not like the sale of a growing crop, as the whole of the contract was connected with a permanent interest in land. Although it may be said that the plaintiff is entitled to recover on the account stated; yet that count is not supported by the evidence, as it did not appear that the premises were repaired at the time the first quarter's rent was paid. At all events, the conversation that took place between the plaintiff and defendant, as to the payment of 20*l.*, was not receivable in evidence, as it was only to be paid by the latter in consideration of the former's becoming his tenant under the lease, and it could not have been demanded until that instrument had been executed. There was no binding contract between the parties until the lease was executed, and nothing that passed between them subsequently could alter or vary the covenants therein contained; which were merely the common covenants, for the pay-

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ment of rent, and for the tenant to keep the premises in repair; and it is a well known and established principle, that if the contract for a lease be entire, and its terms accepted by the tenant, and the lease executed, he cannot afterwards shew, by parol, the consideration for which the lease was to be granted, or any stipulation *dehors* that instrument. In *Pickering* v. *Dowson* (*a*), it was held, that if a representation be made, before a sale, of the quality of the thing sold, with a full opportunity for the purchaser to examine the truth of the representation, and a contract of sale be afterwards reduced into writing, in which that representation is not embodied, an action will not lie for a deceit against the vendor on the ground that the article sold does not answer to that representation; and Mr. Justice *Heath* there said (*b*): "It is in vain to reduce a contract to writing, if you may afterwards refer to all that has passed by parol;" and in the subsequent case of *Kain* v. *Old*, Lord Chief Justice *Abbott*, in delivering the judgment of the Court, said (*c*): "Where the whole matter passes in parol, all that passes may sometimes be taken together as forming parcel of the contract, though not always, because matter talked of at the commencement of a bargain may be excluded by the language used at its termination. But if the contract be in the end reduced into writing, nothing which is not found in the writing can be considered as a part of the contract." There, an instrument in writing was signed and delivered to the plaintiff, describing a ship as copper bolted, and the vendor afterwards executed a bill of sale in the usual form, which did not describe her as being copper bolted, and it was held, that an action for a breach of the original warranty could not be maintained, as the original instrument did not recite the certificate of the registry of the ship, and was

(*a*) 4 Taunt. 779.
(*b*) Id. 784.
(*c*) 2 Barn. & Cres. 634; *S. C.* 4 Dow. & Ryl. 61.

therefore void by the statute 34 *Geo.* 3, c. 68, s. 14. That case is far stronger than the present, as there the original contract was in writing, whilst here the evidence as to the payment of the 20*l.* was parol only, and formed no part of the covenants contained in the lease, which can alone be referred to as evidence of the contract between the parties.

Lord Chief Justice BEST.—This is a most iniquitous objection. The defendant has had all the advantage of his contract: and although he admitted, after the lease was executed, that he was liable to pay the plaintiff for the repairs; yet he now seeks to get rid of his liability by a mere technical objection. It is quite clear that, if this case fell within the rule of law contended for, we could not disregard it; but I am of opinion that we may get over the difficulty, and arrive at the justice of the case. If the promise to pay the plaintiff the sum of 20*l.* had formed part of the consideration for granting the lease, there can be no doubt but that such consideration must have appeared on the face of that instrument, and could not have been supplied or proved by parol. If, therefore, the plaintiff's claim had rested on the special counts alone, she could not have recovered, as they all state that, in consideration that the plaintiff would become tenant to the defendant of a certain house, at a yearly rent, the latter promised to give her 20*l.* to repair the house, and also to make certain alterations therein; and in the *first* count it is stated that the plaintiff was to become tenant to the defendant, under a lease to be granted to her by him. If, therefore, the contract as to the 20*l.* formed part of the consideration for granting the lease, the plaintiff could not recover, as she did not prove that it had been reduced into writing. But she accepted the lease, and actually did the repairs for which she now seeks to be paid. The defendant approved of the manner in

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which the premises had been repaired; for, when the plaintiff paid her first quarter's rent, and asked for the 20*l.* agreed to be paid her for doing the repairs, the defendant said, that it was not convenient for him to pay then, but that he would do so when the next quarter became due. This declaration was clearly admissible in evidence in support of the account stated; for the defendant admitted that a certain sum was due from him to the plaintiff, and promised to pay it. The difficulty that has been raised as to the statute of frauds is, therefore, completely removed; and although the original contract would be void by the operation of that statute; yet there was a moral obligation on the part of the defendant to pay, forming a sufficient consideration for his subsequent acknowledgment, which the law will construe into a legal promise, so as to make him liable to the plaintiff. On the ground, therefore, that there was a distinct acknowledgment by the defendant, that a certain sum was due to the plaintiff, which acknowledgment was founded on a moral obligation, coupled with a promise to pay, at a subsequent period, I am clearly of opinion, that the evidence was admissible, and was properly received under the account stated. There are many authorities to shew, that although the original contract may have failed, yet, if there be a moral obligation, it will support a subsequent promise.

Mr. Justice PARK.—If this point had not been reserved, I should have thought it unnecessary to say any thing, after what has fallen from my Lord Chief Justice. This is a most wicked and unjust attempt by the defendant to cheat the plaintiff; yet if the law had been with him, the Court, on the authority of several existing decisions, could not have interposed, although the justice of the case might have been clearly with the plaintiff. But I am of opinion that the plaintiff is entitled to recover on the

account stated, and that the evidence as to the payment of the 20*l.* is consistent with it. The subsequent promise by the defendant to pay that sum is altogether distinct from the original contract, and amounts to an acknowledgment that the repairs had been properly done by the plaintiff.

Mr. Justice BURROUGH.—I fully agree. The contract by the defendant to pay the plaintiff 20*l.* must be considered as a bargain, wholly independent of the lease. It preceded it; and the subsequent conduct of the parties is of itself sufficient to shew that that sum was to be paid for repairing the premises; and, as the plaintiff has repaired them, there is no pretence whatever for the defendant to say that it ought not to be paid, he himself having, after the lease was executed, acknowledged that it was due, and that the plaintiff had completed the necessary repairs.

Mr. Justice GASELEE.—If this had been an action against the landlord for not granting a lease, or against the tenant for not accepting it, it is quite clear, that the objection must have prevailed, as that would have been within the statute of frauds. As the lease contained a general covenant by the tenant to repair, it could not be modified or qualified by evidence *aliunde*. But it is unnecessary to decide that question; and I trust that the conclusion to which the Court have arrived, and the grounds on which we found our judgment, may be generally known, in order that a tenant who takes possession of premises under an agreement for a lease, and who repairs them on the faith of his landlord's agreeing to repay him for such repairs, will act imprudently, if he sign such lease till he has been repaid the sum expended for such repairs. Here the defendant agreed to pay 20*l.* to the plaintiff to repair the house, but afterwards said, that she could not prove the contract, as no one but her daughter was present at the

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time it was made, and that she was an incompetent witness. This was a most dishonest mode of defending himself; and he now rests on a mere legal objection. But I am of opinion that the plaintiff is entitled to recover, independently of the lease, on the evidence adduced at the trial, by which it appeared, that, after the execution of the lease, and after the repairs had been done by the plaintiff, the defendant acknowledged that he owed her 20*l.*, and promised to pay it when the next quarter's rent became due. Although, therefore, the defendant might not be bound by the terms of his original contract, yet a subsequent acknowledgment and promise by him to pay a certain sum, is sufficient evidence to support the plaintiff's demand on the account stated.

Rule refused.

Monday, Jan. 28th.

GODEFROY *v.* JAY and Another, Gents. Two, &c.

The plaintiff declared against an attorney for negligence in not causing an application to be made to the Court, to set aside proceedings in an action brought against him, on the ground that he had never been served with process, in *consequence whereof* judgment was signed against him by default, and afterwards final judgment was sued out, and execution issued thereon:—Held, that it was incumbent on the plaintiff to produce an examined copy of the record, to prove both the judgments;—and that proof of the entry of the judgment by default in the Prothonotary's Book, and the inquisition, with the Prothonotary's *allocatur*, were not sufficient evidence of such judgment.

THIS was an action of *assumpsit*. The declaration stated—That, before the time of the retainer and making the promise of the defendants, thereinafter mentioned, a certain notice, in writing, was delivered to, and served on, the plaintiff, stating that a declaration was filed with the Prothonotaries of this Court, against the plaintiff, at the suit of one *Stephen Dubois*, in an action on the case, and that unless the plaintiff pleaded thereto within a certain time in the notice specified, judgment would be signed against him by default; that the plaintiff had never been served with any writ or process, or copy of any writ or process, issuing out of this Court against him, at the suit of the said *Stephen Dubois*, nor had he been arrested or held to bail, at his

suit, upon or by virtue of any writ or process issuing out of this Court; that the plaintiff thereupon applied to the defendants, who were attornies at law, and delivered the said notice to them, and, at their special instance and request, retained and employed them as his attornies, to take the necessary and proper steps in the premises, for reasonable fees and reward to them in that behalf; and that the defendants accepted the said retainer, and, in consideration of such retainer, they promised the plaintiff, well, faithfully, skilfully, and diligently, to perform and discharge their duties, as the attornies of the plaintiff in the premises. The plaintiff then averred, that it became and was their duty, as such attornies for the plaintiff in the premises, to have applied, or caused application to be made, to this Court, in due time, to have the proceedings in the said action, at the suit of *Dubois* against the plaintiff, set aside, by reason, and on the grounds, that the plaintiff had never been served with any writ or copy of process at the suit of *Dubois*, nor had he been arrested at his suit by virtue of any process issuing out of this Court against the plaintiff, whereof the defendants had notice; yet that they, not regarding their duty in that behalf, but contriving and intending to injure the plaintiff, did not make, or cause application to be made to this Court, in due time, for the purpose aforesaid, or take any other proper steps in the premises, as the attornies of and for the plaintiff, but wholly neglected and omitted so to do: by reason and *in consequence whereof*, and by and through the neglect and default of the defendants in that behalf, afterwards, to wit, on &c., at &c., *judgment by default was signed* against the plaintiff in the said action; and such further procedings were had therein, that afterwards, to wit, in *Easter* Term, 7 *Geo. 4, it was considered and adjudged* in and by this Court, that *Dubois* should recover against the plaintiff 31*l.* 5*s.*; and that execution was, afterwards, to wit, on &c., issued upon the said judgment, and

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the plaintiff, in order to satisfy the said execution, was obliged to, and did, afterwards pay to *Dubois* the sum so recovered as aforesaid, together with 5*l.* the costs of, and occasioned by, the execution. The defendants pleaded the general issue.

At the trial before Mr. Justice *Burrough*, at *Guildhall*, at the adjourned Sittings after the last Term, a book was produced from the Prothonotaries' Office, in order to shew that judgment by default had been signed against the plaintiff, in the action brought against him by *Dubois;* and the clerk who produced it said that it was the book in which judgments by default were regularly entered. The inquisition was also put in, with the Prothonotary's *allocatur* of the costs; but it appeared that the judgment-roll had not been carried in: when it was submitted for the defendants, that the evidence offered, as to the judgment by default, was not the best evidence, as it should be proved by an examined copy of the record; and that the entry in the Prothonotary's book did not support the allegation in the declaration, that judgment by default was signed against the plaintiff, as it merely contained the names of the parties to the cause, and the fee payable to the office on making such entry. The learned Judge, being of opinion that the objection was well founded, directed a nonsuit.

Mr. Serjeant *Taddy* now applied for a rule *nisi*, that this nonsuit might be set aside, and a new trial granted; and submitted, that it was not necessary for the plaintiff to prove the allegation as to the judgment by default, as it merely went to the consequential damage he had sustained, and not to the gist of the action, which was the negligence of the defendants in having allowed such judgment to be signed against him, as is stated in the declaration; and that, in an action for a tort, a plaintiff is not bound to prove the whole of the facts alleged in his declaration by way of special damage; for that, if he

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prove that he has sustained an injury by the misconduct of the defendant, it is sufficient.

Lord Chief Justice BEST.—I am of opinion, that there is no pretence for this application. The plaintiff should have shewn that the judgment by default, which had been signed against him, had been completed. He could not bring a writ of error without it. Besides, it is stated on the record that final judgment was afterwards sued out against the plaintiff, and execution issued thereon; and such judgment should, at all events, have been proved by the production of an examined copy of the record.

Mr. Justice PARK concurred.

Mr. Justice BURROUGH.—It is quite clear, that the judgment-roll should have been carried in, as the plaintiff in the original action might have been compelled to make up the record. The plaintiff could not shew that he had sustained any damage, without proof of the judgment. He should, therefore, have produced the judgment-roll, or an examined copy of the record, which would have contained the judgment by default, as well as the final judgment; and it appeared at the trial, that the judgment-roll had not been carried in.

Rule refused.

PHILLIPS *v.* CRUTCHLEY.

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In an action for a breach of promise of marriage, the promises declared on were; *first*, to marry on request; *secondly*, the like, assigning for breach, that the defendant had married another; *thirdly*, to marry within a reasonable time; and, *lastly*, to marry generally. The proof was, that the defendant had said that he would marry the plaintiff in *July*:—Held, that, notwithstanding this variance, the Jury were warranted, by the evidence, in inferring a promise to marry generally; and that the plaintiff was entitled to recover on the last count of the declaration.

THIS was an action of *assumpsit* for a breach of promise of marriage. The declaration contained four counts. The

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first, to marry the plaintiff on request, with a common breach; the *second*, to marry her on request, assigning for breach, that the defendant had married another; the *third*, to marry the plaintiff within a reasonable time; and the *fourth*, to marry her generally. At the trial, before Mr. Justice *Burrough*, at *Westminster*, at the adjourned Sittings after the last Term, it appeared, that, in several conversations between the plaintiff and defendant, the latter said that he would marry her in *July;* that he should be happy to be married sooner, but that he must provide for his sister, who had kept his house for him, which could not be done before *July;* and he always mentioned that month as being fixed on by him for the marriage. It was also proved that, before *July*, the defendant married another woman. For the defendant, it was submitted, that neither of the counts in the declaration could be supported, as the only promise proved was, to marry at a given time, namely, in the month of *July*. The learned Judge, however, thought there was sufficient evidence of a general promise, and the Jury found a verdict for the plaintiff—Damages, 200*l*.

Mr. Serjeant *Wilde* now applied for a rule *nisi*, that this verdict might be set aside, and renewed the objection raised at the trial, *viz*. that there was no evidence to support either of the counts of the declaration, as the defendant had fixed *July* as the month in which the marriage was to take place, and the promises were merely stated to be, to marry the plaintiff on request, or within a reasonable time.

But the Court were of opinion, that, as the declaration contained a count on a general promise to marry the plaintiff, it was sufficient; and more particularly so, as it was proved that the defendant had married another woman previously to the month of *July;* that there was sufficient evidence of a general promise; and that it was enough

for the plaintiff to shew that the defendant had married another.

Rule refused (*a*).

(*a*) In *Potter* v. *Deboos* (1 Stark. N. P. C. 82), the plaintiff declared on promises—to marry in six or seven months—to marry in a reasonable time—and to marry generally. The evidence was, that the defendant had said that he would marry the plaintiff in six months, or in a month after *Christmas*. It was submitted for the defendant, that the promise proved varied from that laid in the first count, and that, as a *special* promise appeared in evidence, no *general* promise could be presumed. But Lord *Ellenborough* left it to the Jury to say, whether or not they would, from the circumstances, presume a general promise to marry (which the law would consider as a promise to marry within a reasonable time), and whether the declaration of the defendant had any other effect than to render that definite and certain, which before was uncertain. The Jury found for the plaintiff.

GOODMAN *v.* KENNELL.

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A person occasionally employed by the defendant as his servant, being sent out by him on his business, took the horse of another person, in whose service he also worked, and, in going, rode over the plaintiff. At the trial, it was left to the Jury to say, whether or not the horse was taken by the servant with the *implied* consent or authority of the defendant; and they having found a verdict for the plaintiff, the Court refused to grant a new trial.

THIS was an action on the case, brought by the plaintiff to recover damages for an injury which he had sustained by having been knocked down, and run over, by a horse, which a person of the name of *Cocking* was riding. The declaration contained two counts. The *first* stated, that, on the 1st *July*, 1827, the defendant *was possessed* of a certain horse, which was under the care, government, and direction of a *certain servant* of the defendant, who was then riding the same in and along a certain public and common highway, to wit, at &c.; nevertheless, that the defendant, by his said servant, so carelessly, negligently, and improperly, rode, governed, and directed the said horse, that by and through the carelessness, negligence, and improper conduct of the defendant, by his said servant in that behalf, the said horse of the defendant ran and

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struck against the plaintiff, then being upon the said highway, and then and there knocked him down with great force and violence to and upon the ground, and the said horse then and there ran and passed upon and over the plaintiff; whereby his shoulder bone was dislocated, and he was otherwise greatly injured, prevented from attending to his business, and put to expense in his cure. The *second* count was similar to the first, only stating that *the defendant* was riding the horse. The defendant pleaded the general issue.

At the trial, before Mr. Justice *Park*, at *Guildhall*, at the Sittings after the last Term, it appeared, that the horse on which *Cocking* was riding, did not belong to the defendant, nor was *Cocking* his regular servant, but was only occasionally employed by him, and others in the neighbourhood in which he lived, as such; and, amongst others, by the owner of the horse in question. It also appeared, that, on the day stated in the declaration, the defendant had sent *Cocking* to take a book from his house at *Vauxhall* to *Furnival's Inn*, for which he gave him a shilling, and that he had taken the horse from a stable that was occupied by the defendant jointly with the owner of the horse, which he was in the habit of attending to, and occasionally exercising; but it did not appear that he rode it to *Holborn*, on the day in question, by the orders either of the owner or of the defendant; nor that he communicated to either that he was about to do so; and, on the owner being called as a witness, he said, that he had expressly ordered *Cocking* never to ride his horse to Town. It was also proved, that *Cocking* was riding very fast, and, after knocking down the plaintiff, who was crossing the road, galloped on, although requested to stop by several persons who witnessed the accident. It further appeared, that the defendant had been summoned before a magistrate at the *Queen Square* Police Office, when he stated, that *his* horse was a dangerous horse, and that no one could ride him but *Cocking*. That statement, how-

ever, was denied by several witnesses. Under these circumstances, the learned Judge told the Jury that *Cocking* being, at the time of the accident, the servant of the defendant, and the horse, the defendant's horse for the occasion, it was for them to say, whether or not, from the circumstances, they could infer that the horse had been used by *Cocking*, by the direction of the defendant, or with his implied consent; and he told them, that the defendant was responsible, if such an authority could be presumed from the evidence. The Jury found a verdict for the plaintiff—Damages, 60*l.*

Mr. Serjeant *Taddy* now moved that that verdict might be set aside, and a new trial granted, on the ground, that, as the horse on which *Cocking* rode was not the defendant's horse, and the rider not in his absolute service or employ; and as he rode the horse on the day in question without the knowledge or consent either of the defendant or of the owner, and not in the ordinary discharge of his duty, the defendant could not be deemed amenable for a damage sustained by his wrongful act. He submitted, that if a person employ a servant to carry a parcel, and he take the horse of another, unknown to his employer, and an injury happen in consequence, it could not be contended for a moment that the latter is responsible; for, if it were so, every master might be ruined by the improper acts of his servant, done without his knowledge or authority; that here there was no evidence of any authority given by the defendant to *Cocking* to use the horse; and the owner stated, that he had prohibited him from riding it to *London;* that, although it was stated at the trial, that the defendant at the Police Office said that the horse was his, that was expressly contradicted by affidavits; and that, as the damages were, under the circumstances, excessive, the defendant was at all events entitled to a new trial, on payment of costs.

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Mr. Justice PARK.—A master would not, certainly, be liable for an act done by his servant whilst riding the horse of another, without his knowledge, or against his consent. But, in the present case, the question was, whether or not there was sufficient evidence of an assent or authority, either express or implied, from the defendant to *Cocking*, to use the horse. *Cocking* was sent by the defendant to Town on his business, and he took the horse, which, it was proved, he was in the habit of riding or exercising. There were, therefore, strong grounds from which the Jury might infer such an assent; particularly as it was sworn that the defendant had, before a magistrate, admitted the horse to be his; and he afterwards refused to name the owner, although he resided in the same house with him, they being joint occupiers of the house as well as of the stable; and, shortly before the accident, each had a horse there; and although *Cocking*, who was called as a witness for the defendant, stated, that the horse in question was the horse of another person, and that he had taken it without the knowledge or consent either of the defendant or of the owner, yet, as he prevaricated, and was contradicted on several other points, the Jury, probably, did not attach much credit to his testimony. The damages appear to me to be, under all the circumstances, extremely moderate; for the plaintiff was an aged man, and was most seriously injured, and will probably feel the effects of the accident as long as he lives.

Lord Chief Justice BEST.—As I am now put in possession of all the facts of this case, and distinctly understand how the point was left to the Jury, I am of opinion that it was rightly left. It has been truly said, that a servant's riding the horse of another, without the assent or authority of his master, cannot render the latter answerable for his acts. But here the question was, whether there was not sufficient evidence to shew that *Cocking* was rid-

ing the horse with the defendant's assent, and on his business. It was proved, that *Cocking* was the servant of the defendant; that the horse was in his stable; and that, on the day the accident happened, *Cocking* was going on the defendant's business or employment. The proof of these three facts was sufficient to raise a strong presumption, that *Cocking* was using the horse with the defendant's consent; and although there was contradictory evidence in this respect, and *Cocking* stated that he had taken the horse improperly, yet he swore to several other facts which were expressly contradicted by other witnesses, and left the plaintiff a *primâ facie* case, and unanswered. Another strong circumstance, and which might have had considerable weight with the Jury, was, that the defendant refused to tell to whom the horse belonged. Such conduct was highly improper, and, connected with the other circumstances of the case, tended to shew that the horse was used on his business. I am therefore of opinion, that there is no sufficient ground to disturb this verdict. The plaintiff was clearly entitled to recover damages for the injury he had received through the improper conduct of *Cocking*, who was employed by the defendant, and in his service at the time of the accident.

Mr. Justice BURROUGH.—This case was properly left to the Jury; and I see no reason to be dissatisfied with their verdict.

Mr. Justice GASELEE concurring—

Rule refused.

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BENSON *v.* HIPPIUS.

By a charter-party, fifty running days were to be allowed for loading and unloading a cargo of timber, and ten days on demurrage, over and above the laying days, at 10*l. per* day; and by the bill of lading, freight was to be paid as *per charter-party*. The consignees having placed the cargo in the defendant's hands, for sale, he engaged, in writing, to pay the owner the freight and primage (and demurrage, if any were due), *and in every respect to put himself in the place of the charterer*. The ship having been detained, in unloading her cargo, beyond the lay-days and days of demurrage in the charter-party:—Held, that the defendant was liable to the owner for such detention.

THIS was an action of *assumpsit* on a special agreement. The *first* count of the declaration stated—That, before the making of the promise of the defendant, thereinafter next mentioned, a certain charter-party had been made and entered into, between the plaintiff, as owner of the ship *Trusty*, and one *Bennett Thomas Gillam*, merchant; whereby it was agreed between them, that the said ship, being tight, staunch, &c., should, with all convenient speed, sail and proceed to *Quebec*, or as near thereunto as she might safely get, and there load, from the factors of the said merchant, a full and complete cargo of square masts, yellow pine timber, and deals, &c., but not exceeding what she could reasonably stow and carry, over and above her tackle, &c.; and being so loaded, that the said ship should proceed therewith to *London*, and deliver the same on being paid freight as in the charter-party mentioned (the act of God, &c. &c., excepted); and that the freight should be paid on unloading and right delivery of the cargo, one half in cash, the remainder in approved bills at four months following; and that fifty running days should be allowed the said merchant (if the ship was not sooner despatched) for loading the ship at *Quebec*, and unloading at *London*, and ten days on demurrage, over and above the said laying days, at 10*l. per* day, and that the ship should discharge in the Docks if required by the freighters, they paying two thirds of the dues.—The plaintiff then averred, that, before the making of the promise of the defendant thereinafter next mentioned, the ship had sailed and proceeded to *Quebec*, and there loaded, from the factors of the said merchant, a full and complete cargo, according to the terms of the charter-party, and therewith sailed and proceeded to *London*, and was, before the making of the

defendant's promise, ready to discharge her cargo in the Docks there, and that certain persons using the name, style, and firm of *John Pirie & Co.*, to whom the cargo of the said ship was consigned, had requested the defendant to sell the same for them, the said *John Pirie & Co.*; of all which said several premises the defendant had notice. And thereupon, afterwards, to wit, on &c., at &c., in consideration that the plaintiff, at the special instance and request of the defendant, would deliver to him, the defendant, the said cargo, according to the terms of the charter-party, he, the defendant, undertook and promised the plaintiff, to pay him the freight, primage, and likewise demurrage, for the same, if any demurrage should be, or become, due. The plaintiff then averred, that he, confiding, &c., did deliver to the defendant the said cargo, to wit, at &c.; and that the said ship was, without the act of God, &c. &c., kept and detained, in the loading thereof at *Quebec*, and in the unloading thereof at *London*, for a long space of time, to wit, for the space of fifty days, over and above the said fifty running days in the charter-party mentioned; whereby, a large sum of money, to wit, the sum of 100*l.* for ten of the said days, over and above the said fifty running days, being at and after the rate of 10*l.* *per* day, became and was due and payable from the defendant to the plaintiff; and that the plaintiff, for the detention of the said ship for forty days, residue of the said fifty days, during which the said ship was kept and detained over and beyond the said fifty running days as aforesaid, reasonably deserved to have from the defendant a further large sum of money, to wit, the sum of 400*l.*; whereof the defendant afterwards, to wit, on &c., at &c., had notice, and was then and there requested by the plaintiff to pay him as well the said sum of 100*l.*, as the said sum of 400*l.*, according to his said promise and undertaking; and assigned for breach, non-payment of both these sums.

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In the *second* count, the defendant's promise was stated thus:—*viz.* "That in consideration that the plaintiff, at the request of the defendant, would deliver to him, the defendant, the cargo, according to the terms of the charter-party; he, the defendant, undertook and promised the plaintiff to pay him the freight and primage, and demurrage for the same, if any demurrage should be due, *and in every respect to put himself in the place of the said B. T. Gillam*, the charterer of the ship, so far as respected the agreement made with the plaintiff for the said voyage." It was then averred—that afterwards, to wit, on &c., at &c., the defendant requested the plaintiff to discharge the cargo in the Docks, and that he, confiding &c., did afterwards, to wit, on &c., at &c., deliver to him, the defendant, the said cargo in the Docks at *London*, to wit, at &c., and that the ship was, without the act of God, &c., kept and detained in the loading thereof at *Quebec*, and in the unloading thereof at *London*, fifty days, over and above the said fifty running-days in the charter-party mentioned; whereby the sum of 100*l.* for ten of the said days, over and above the said fifty running-days, being at and after the rate of 10*l. per* day, became due and payable from the defendant to the plaintiff for demurrage, according to the terms of the charter-party, and the tenor and effect of the promise and undertaking of the defendant in that behalf; and the plaintiff, for the detention of the said ship for forty days, residue of the said fifty days, during which the ship was so kept and detained over and beyond the said fifty running days, and for being deprived of the use of the ship, and of all the profits thereof, during the time she was so kept and detained; and for the maintaining the master and crew of the said ship, during the said forty days, reasonably deserved to have, of and from the defendant; and the defendant according to his promise and undertaking, and the said agreement so made for the voyage, became liable to pay to the plaintiff the further sum of 400*l.*; whereof the defendant

afterwards, to wit, on &c., at &c., had notice; assigning for breach non-payment of those sums, as in the first count. There were also counts for demurrage, and the common money counts. The defendant pleaded the general issue.

At the trial, before Mr. Justice *Gaselee*, at *Guildhall*, at the adjourned Sittings after the last Term, it appeared that the plaintiff was a ship-owner, and the defendant a timber-broker in *London;* that a charter-party had been made and entered into on the 18th *March*, 1825, by the plaintiff, as owner of the ship *Trusty*, and *B. T. Gillam*, on a voyage from *London* to *Quebec*, and back to *London*, with a cargo of timber; and fifty running days were to be allowed for loading and unloading, and ten days on demurrage over and above the laying days, at 10*l. per* day.—For the plaintiff, the master proved that the vessel had been detained in loading at *Quebec* ten days beyond the fifty running days, as *Gillam* the charterer had not provided a proper cargo of timber; that she arrived at *London* with the cargo on the 19th *September*, 1825, and was reported at the *Custom-house* on the 20th; and that, in consequence of the crowded state of the Docks, she was detained there thirty days before the cargo was cleared. The plaintiff refused to deliver the cargo to the order of Messrs. *Pirie & Co.*, the consignees, unless he had an undertaking that the person to whom he delivered it would perform all the stipulations, on the part of the charterer, expressed in the charter-party. The cargo, immediately on its arrival, having been placed by Messrs. *Pirie & Co.* in the hands of the defendant for sale, he entered into the following agreement contained in a letter addressed to the plaintiff.

"*London, Sept.* 21st, 1825.

"Mr. *Thomas Benson*,

"Sir,—Messrs. *John Pirie & Co.*, the consignees of your ship *Trusty's* cargo, having placed it in my hands for sale,

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I hereby engage to pay you the freight and primage (and demurrage if any be due), and in every respect to put myself in the place of Mr. *Gillam*, the charterer, so far as respects the agreement for the said *Quebec* voyage. I am, &c.

C. J. Hippius."

The ship had not begun to unload at the time the agreement was signed by the defendant, and, by the bill of lading, Messrs. *Pirie & Co.*, the consignees, were only to pay freight as *per* charter-party. The defendant paid 100*l.* into Court, to cover the ten days' demurrage at *Quebec*, and the plaintiff sought to recover for the further detention of the ship in unloading at the Docks.—For the defendant it was admitted, that, as between *Gillam* the charterer, and the plaintiff, if the delay arose from the crowded state of the Docks, and without any fault of the master, the charterer would be liable; but it was contended that the question was not between him and the plaintiff, but between him and the defendant, and that the latter was merely a third party; and that the consignees, for whom he acted, had only contracted to pay freight as by the bill of lading, and not demurrage; and that, as the ship had not begun to unload at the time the defendant entered into the contract, it was impossible to say what delay might afterwards arise in discharging the cargo. The learned Judge, however, was of opinion, that the engagement by the defendant to pay the freight and demurrage, did not refer to the bill of lading; and as he had undertaken to put himself in every respect in the place of the charterer, he was equally liable as *Gillam* himself. The Jury accordingly found a verdict for the plaintiff for 300*l.*, for thirty days' detention in unloading the cargo at the Docks, at 10*l. per* day, according to the rate of the days of demurrage in the charter-party. Leave, however, was reserved to the defendant to move to set aside the verdict, and that a nonsuit might be

entered, in case the Court should be of opinion that the plaintiff was not entitled to recover.

Mr. Serjeant *Taddy*, now applied accordingly, and submitted—in the *first* place, that there was no sufficient consideration moving between the plaintiff and defendant, apparent on the face of the contract or agreement, under which he was sought to be charged in this action; and he cited the cases of *Wain* v. *Warlters* (*a*), and *Saunders* v. *Wakefield* (*b*), which, with several subsequent decisions, he contended, were expressly in point to shew that there must not only be a good consideration for a promise in writing to pay the debt of another, as well as for any other promise, but that the consideration for the promise, as well as the promise itself, must appear on the face of the agreement on which the action is founded; and that here there was no consideration moving from the plaintiff to the defendant; but that the consideration, if any, moved from Messrs. *Pirie & Co.*, the consignees, who had placed the cargo in the defendant's hands for sale. And he insisted that, at all events, the declaration could not be supported, as it stated (in both counts) that, in consideration that the plaintiff *would* deliver the cargo to the defendant, he undertook to pay the freight &c., and the agreement stated, that the consignees *had* placed the cargo in his hands for sale.—*Secondly*, that by the terms of the agreement, the defendant could only be liable for the demurrage due at the time of his signing that instrument, and not for contingent damages for future detention or delay, which were altogether distinct from and independent of demurrage, which was expressly provided for by the terms of the charter-party—that if the ship had lost a season by delay or detention beyond the lay-days, or days of demurrage, expressed in the charter party, it could not be con-

(*a*) 5 East, 10. (*b*) 4 Barn. & Ald. 595.

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tended, that the defendant would be liable to the full extent of such loss;—that the consignees could only be liable for freight according to the terms of the bill of lading, and the defendant only undertook to pay the demurrage due from the charterer at the time of entering into the agreement, which he properly paid into Court;—that there was no agreement in the charter-party to pay demurrage, if the ship should be detained beyond the days therein specified;—and that it must be implied from the defendant's contract, that he meant to pay the demurrage *then due*, if any should be due, and not to render himself liable for contingent damages arising from the delay or detention of the ship in the Docks.

Lord Chief Justice BEST.—This was an action brought by the plaintiff, as owner of the ship *Trusty*, in which he sought to recover from the defendant a compensation in damages for a delay, in unloading her cargo in the Docks, beyond the days of demurrage stipulated for by the charter-party. Two objections have been raised as to the plaintiff's right to recover: *first*, that there is no consideration, apparent on the face of the contract, moving from the plaintiff to the defendant, and that *Wain* v. *Warlters*, and several subsequent decisions, shew, that an action cannot be maintained, unless the consideration for the defendant's promise, as well as the promise itself, be expressed in the contract or agreement, for the breach of which the defendant is sought to be charged. But I am of opinion, that a consideration sufficiently appears for the purpose of maintaining this action. The contract is loosely worded, and is in the shape of a letter from the defendant to the plaintiff, wherein he states that Messrs. *Pirie & Co.*, the consignees of the plaintiff's ship's cargo, having placed it in his hands for sale, he engages to pay the plaintiff the freight and primage, and demurrage if any were due. Considering the relative situations of the parties, this ap-

pears to me to be a sufficient consideration, as between the plaintiff and defendant. The former was the owner of the ship, and Messrs. *Pirie & Co.* were the consignees of the cargo, and had placed it in the defendant's hands for sale; and therefore, if the plaintiff, as such owner, would deliver the cargo to the defendant, he undertook to pay the freight, primage, and demurrage, which the charterer was bound to pay. *Secondly*, it has been insisted, that the plaintiff is not entitled to recover for the delay in unloading at the Docks beyond the ten days' demurrage, as stipulated or provided by the charter-party. But the defendant expressly undertook *to put himself in every respect in the place of the charterer.* He made himself liable not only to pay the freight, &c., due from Messrs. *Pirie & Co.*, the consignees, but to put himself in the place of the charterer, so far as respected the agreement for the voyage in question. Whatever, therefore, *Gillam*, the charterer, was bound to pay, the defendant agreed to be liable for; and there can be no doubt but that *Gillam* would be liable to the plaintiff, as well from the evidence adduced at the trial, as from the terms of the charter-party. If parties stipulate by such an instrument, that fifty running days are to be allowed for loading and unloading, and ten days on demurrage above those days, at 10*l. per* day, the charterer is liable for any detention beyond such days of demurrage; for, in point of fact, detention and demurrage amount to the same thing, as the latter is a compensation due to the ship-owner from the freighter, by reason of any delay or detention of the ship beyond the time expressed in the charter-party; and as the defendant agreed to put himself in the place of the charterer, he is liable to the plaintiff for the ship's detention at the Docks until the cargo was finally discharged. It was admitted at the trial, that the delay in unloading the cargo was attributable to the crowded state of the Docks, and not to any act or fault of the master. As, therefore,

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the vessel was prevented from being unloaded within the lay days and days of demurrage allowed by the charter-party, the charterer was liable for the detention of the ship beyond that period; and if she were to be detained at the expense of the charterer, on the one hand; as the defendant had agreed to place himself in his situation, he is equally liable on the other.

The rest of the Court concurring—

Rule refused.

Thursday, Jan. 31st.

EARLE *v.* HOLDERNESS.

In trover for several letters, one of which was addressed to the plaintiff, and the others to *N. H.*, or to the plaintiff, if *N. H.* had left *England*, the Court ordered the proceedings to be stayed, on the defendant's delivering up to the plaintiff the letter addressed to him, and paying the costs of the action and application, if the plaintiff would accept the same in discharge of the action; but ordered, that if he would not accept that letter, and did not recover damages for the others, or should recover nominal damages only for that offered to be delivered up, he was to pay the costs of the action.

A RULE was obtained by Mr. Serjeant *Wilde*, on a former day in this Term, calling on the plaintiff to shew cause, why, upon delivering up to him, or to his attorney, a certain letter or packet in the possession of the defendant, superscribed, "Mr. *Earle, Clapham, Surrey*," and upon payment by the defendant to the plaintiff of his costs in this cause, up to the present time, to be taxed by one of the Prothonotaries, all further proceedings should not be stayed. The affidavit in support of the rule stated—that this was an action of trover, and brought against the defendant, in consequence of his having refused to deliver over to the plaintiff certain letters or packets, received by the defendant from *Demerara;*—that, in consequence of the recent death, in *London*, of one Mrs. *Ann Hewlings*, the defendant received a written notice from one *Haydon*, the brother of the deceased, claiming to be her next of kin, forbidding the defendant to part with or deliver up any letters or packets, in his possession, addressed to her, or to any person connected with her affairs; and that the defendant also received a written notice from one *Kernan*, claiming to be executor of the last will of Mrs. *Hewlings*, also forbidding him to part with or deliver any letters addressed to her, excepting to him, *Ker-*

nan;—that, being in possession of some letters or packets variously superscribed, and all, as the defendant believed, relating to or connected with the deceased's affairs, he took advice of counsel; and being advised that he must retain the letters or packets in question in his possession, he, the defendant, in consequence, refused to deliver any part thereof to the plaintiff;—that the defendant proposed to open the letters or packets, in the presence of the plaintiff and the person claiming to be the deceased's next of kin, and executor;—and that he was advised, and believed, that he had a good and substantial defence to this action, upon the merits, excepting as to one letter or packet in his possession, superscribed, "Mr. *Earle, Clapham, Surrey,*" upon which, doubts having arisen as to the defendant's right of detaining the same, he was desirous of delivering up such last-mentioned letter or packet to the plaintiff. The learned Serjeant relied on the case of *Pickering* v. *Truste* (*a*), where, in an action of trespass for seizing leather, the Court ordered the proceedings to be stayed on the defendant's restoring it, or paying its full value, together with the costs of the action.

Mr. Serjeant *Taddy* now shewed cause, on affidavits, which stated—That, for several years last past, the plaintiff had had considerable transactions and dealings with Mrs. *Hewlings*, of *Demerara*, and since of *London*, lately deceased, by buying and selling, exporting and sending out to *Demerara*, divers goods; and that, at the time of her death, she was indebted to him in a considerable sum, on account of such goods;—that he had also been in the habit of receiving remittances and orders for the purchase of other goods, from the friends, and also from the establishment, of Mrs. *Hewlings*, through the defendant;—that, since her death, the defendant had had transmitted

(*a*) 7 Term Rep. 53.

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to him, and had received, various packages and letters, containing remittances and orders for goods, intended for the plaintiff, which the defendant had refused to deliver up to him; that is to say, one letter or packet, containing enclosures, supposed to be remittances or orders, addressed to the plaintiff, by the description of, "Mr. *Earle, Clapham;*" one other letter, addressed, "Mrs. *A. Hewlings*, or Mr. *Thomas Earle* (meaning the plaintiff), if Mrs. *Hewlings* has left *England*," containing certain enclosures of orders or bills of exchange, as the plaintiff was informed and believed; one other letter, addressed to, and superscribed, "Mrs. *A. Hewlings*, or, should she have left *England*, do me the favour to forward this to Mr. *Thomas Earle* (meaning the plaintiff), *Clapham;*" containing, as the plaintiff was informed and believed, various bills of exchange and orders for him;—that he made many applications to the defendant for the letter or packet addressed to him, and also, with the approbation and concurrence of the said Mr. *Kernan*, for the other letters or packages enclosing bills of exchange and orders, and addressed to the said Mrs. *Hewlings*, or to the plaintiff in case she should have left *England;* but that the defendant had refused to hand over the same to the plaintiff: whereby he had sustained, and still might sustain, considerable loss and injury by the detention of the said letters.—Under these circumstances, the learned Serjeant contended, that the defendant had no right to detain either of these letters; and that this case was distinguishable from *Pickering* v. *Truste*, as there the whole of the goods were offered to be restored to the plaintiff; and Lord *Kenyon* said (*a*): "Formerly, such an application would not have been successful. The Court, in answer to an application to bring goods into Court, used to say, they had no warehouse for such pur-

(*a*) 7 Term Rep. 54.

pose; and the rule was confined to the instance of bringing money into Court." And, in the late case of *Tucker* v. *Wright* (*a*), this Court refused to stay proceedings in an action of trover, on the defendant's delivering up to the plaintiff the goods for which the action was brought, on payment of the value thereof; such value not having been ascertained at the time of bringing the action; and Lord Chief Justice *Best* there said: "Such a motion as this was never made before; and, if acceded to, it would, in effect, convert the officers of this Court into a jury."—So, here, there is no ground for the application. The defendant must determine whether he will defend the action or not; and he cannot separate one letter from several others on which the plaintiff has declared, and move that all further proceedings in the cause may be stayed. All the letters relate to one and the same concern, and stand on the same grounds; and, as the action was well founded at the time it was brought, the defendant cannot deprive the plaintiff of his right to proceed, nor can he, by giving up a part of the original demand, *viz.* the letter to which it is admitted that the plaintiff was entitled, leave him to go down to trial on a doubtful claim, by which his original cause of action may be altogether defeated.

Mr. Serjeant *Wilde*, in support of his rule.—The plaintiff may proceed for the recovery of the other letters, if he think fit; but the Court will, at all events, order the proceedings to be stayed, *quoad* that letter which the defendant is ready to deliver up. It appears that he had various transactions with Mrs. *Hewlings*, who formerly resided at *Demerara*, but lately died in *London*. The letters, as set out in the plaintiff's affidavits, appear to have been addressed to her, and, if she should have left *England*, then to the plaintiff. On her death, her representatives stood in

(*a*) 3 Bing. 601.

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her place, and the rights of all parties were not only altered thereby, but the alternative, by which the plaintiff could lay claim to these letters, never happened, as Mrs. *Hewlings* never left *England*. The defendant offered to open all the letters so addressed in the presence of the plaintiff's attorney, and is now willing to give up that directed to him; and the defendant had notice from the executor and next of kin of Mrs. *Hewlings* not to deliver them up. The defendant did not become possessed of the letters by any act of his own, but as her agent; and, in *Pickering* v. *Truste*, the Court stayed the proceedings even in an action of *trespass*, on the defendant's undertaking to restore the goods, or pay the value of them; and in *Brunsdon* v. *Austin* (*a*), in *trover*, by the assignees of a bankrupt, for a steam-engine, &c. the Court of *King's Bench* made a special rule for staying the proceedings, on the defendant's delivering to the plaintiffs *a part of the goods* for which the action was brought, and payment of costs up to that time, provided the plaintiffs would accept thereof in discharge of the action; or, otherwise, that the articles delivered should be struck out of the declaration, and the plaintiffs be subject to costs, unless they should obtain a verdict for the remainder of the goods, or prove a deterioration of the part delivered up.

Lord Chief Justice BEST.—That case appears to me to be precisely in point. There, the action was brought for the *whole* of a steam engine; and the defendant admitted that he had no defence as to *part*, and that he was ready to deliver it up to the plaintiffs, and pay the costs of the action up to the time of the delivery; and the Court of *King's Bench* ordered the proceedings to be stayed on terms. Here, it appears that the defendant has a number of letters in his possession, to recover which the present action is brought; but he says, that he has a good

(*a*) Tidd's Practice, 8th edit. 571.

defence, and right to detain all but one, which he is ready to deliver up to the plaintiff. When the Court once went the length of saying, that, if all the goods sought to be recovered by an action of trover were brought into Court, or restored to the plaintiff, they would stay the proceedings, they decided the principle on which this application may be sustained; for in principle no valid distinction can be drawn between the delivery of the whole, and that of a part, of the articles sought to be recovered. It is true, the rule must be specially framed, according to the case in *Tidd*, *viz.* that, on the delivery of part, the plaintiffs might proceed in the action for the recovery of the remainder. This may be assimilated to payment of money into Court, where, if a plaintiff claim 100*l.*, and the defendant bring *50l. into* Court, if the plaintiff proceed in the action, the sum brought in, is, by the terms of the rule, to be struck out of the declaration and paid out of Court to him; and if he proceed to trial, and do not prove more to be due to him than the sum brought in, he must pay the defendant his costs; but, if more appear to be due to him, he is entitled to a verdict for the overplus and costs. Here, as the defendant has applied to stay the proceedings, it is quite clear that he must pay the plaintiff his costs of the action up to this time, as well as of the application; and the rule must be drawn up according to the terms of that in *Brunsden* v. *Austin*.

Mr. Justice PARK.—I yield to the decision of the Court of *King's Bench* in that case. I, at first, thought this was a novel application, but am now of opinion that the proposition made by the defendant is fair and reasonable. The earliest application to stay proceedings in an action of trover, on bringing the goods specified in the declaration into Court, was in *Royden* v. *Batty* (*a*), where the de-

(*a*) Barnes, 2d Edit. 4to, 284.

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fendant obtained a rule to bring bed curtains, &c. into Court, which was discharged, as he had cut and altered them. Here, however, the letter may be given up, as it has received no injury by being in the custody of the defendant.

Mr. Justice BURROUGH.—I am of opinion that this is a most reasonable application on the part of the defendant.

Mr. Justice GASELEE.—In the early history of our law, the Courts would not allow goods to be brought into Court in an action of trover, or order the proceedings to be stayed on delivering them up to the plaintiff: and in *Fisher* v. *Prince*, Lord *Mansfield* said (*a*), he was aware of cases where a laced head (*b*), a gold watch, a diamond ring, and *Chinese* pictures, were refused to be brought in. But, when the principle for so doing is once established, there appears to me to be no distinction between the delivery of the whole, and the delivery of a part only. The case of *Brunsden* v. *Austin*, is precisely in point, and this rule must be drawn up according to the rule in that case, *viz.* that, upon payment of the costs of this application, the defendant shall be at liberty to deliver to the plaintiff the letter addressed to him; and if the plaintiff shall accept such letter, with the costs of the action and of this motion, in discharge of the action, all further proceedings shall be stayed:—if he will not accept it in such discharge, the plaintiff to be at liberty to proceed to trial upon the present declaration; and if he do not recover damages for the other letters, or nominal damages only for the letter offered to be delivered up, then the plaintiff shall pay the costs of the action. On these terms, the rule was made

Absolute.

(*a*) 3 Burr. 1365. (*b*) 2 Str. 822.

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Thursday, Jan. 31st.

HANSON *v.* BLAKEY and Another.

The defendants, being bankrupt, were sued, and suffered judgment by default in *Trinity* Term, and final judgment was entered up, and execution issued thereon, in *Michaelmas* Term following On the 13th *November* in that Term, the defendants obtained their certificate, and, *on the same day*, the sheriff's officer levied, and he, notwithstanding a notice that the defendants' certificate had been allowed, being about to sell the goods seized, the defendants paid the amount of the debt and costs into Court, under a Judge's order, to abide the event of a motion. On application by the defendants to have the money paid out to them, the Court refused to interfere; but left the parties to their *auditâ querelâ*; although it was insisted that, by the 6 *Geo.* 4, c. 16, s. 126, the *goods*, as well as the *persons*, of bankrupts are protected.

ON the 21st *May*, 1826, a commission of bankrupt was issued against the defendants, who were thereupon declared bankrupts. They had been previously indebted to the plaintiff in the sum of 15*l.* for money lent. In *Trinity* Term, 1827, the plaintiff commenced an action in this Court against them, arrested and held them to bail for 15*l.*, and afterwards filed a declaration. The defendants suffered judgment by default in that Term, and the plaintiff, at the beginning of the last Term, entered up final judgment, and sued out a *fieri facias* thereon, which was delivered to the sheriff of *Yorkshire* to be executed. On the 13th *November* last, the defendants obtained their certificate, it being duly allowed and confirmed by the Lord Chancellor on that day; and they gave notice to the plaintiff and his attornies, that their certificate had been so allowed, and that, if the plaintiff attempted to seize the defendants' goods, or to arrest them, under any process in the action, application would be made to the Court, or a Judge, to set aside the proceedings; but the plaintiff did not withdraw the writ from the sheriff, who, on the said 13th *November*, seized a stack of hay belonging to the defendants, and was about to sell the same under the execution, when they gave the above notice. On the 29th *November*, the defendants caused an application to be made to Mr. Justice *Gaselee*, to be relieved from the execution, on the ground that they had obtained their certificate before the levy was made; and on the 4th *December*, that learned Judge ordered that the sheriff should restore to the defendants the goods taken in execution, and that the proceedings under the execution should be suspended, upon payment into Court, by the defendants, of 47*l.* 2*s.* the amount of the debt and costs, together with sheriff's poundage, &c., to abide the event

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of any application to the Court, by either party, to have the same paid out. The money was accordingly paid in by the defendants.

Mr. Serjeant *Peake*, on an affidavit of the above facts, on the first day of this Term, obtained a rule calling on the plaintiff to shew cause why the above sum of 47*l.* 2*s.*, and 2*l.* 7*s.* 1*d.* (for sheriff's poundage), paid into Court by the defendants, pursuant to the above order, should not forthwith be paid out to them; and why, in the mean time, all further proceedings in the cause might not be stayed. The learned Serjeant relied on the case of *Lister* v. *Mundell* (*a*), where, a *fieri facias* having been issued against a bankrupt before he had obtained his certificate, but not executed until afterwards, the Court ordered the goods to be restored, although the bankrupt had not pleaded his certificate according to the statute 5 *Geo.* 2, c. 30, s. 7 (*b*); and he contended that although that statute was repealed by the 6 *Geo.* 4, c. 16, yet, that the 126th section of that act (*c*), must be taken *in pari materiâ* with the 7th section of the former statute, which has been held to apply to *goods* taken in execution, and not to be confined to the *person* of the debtor.

Mr. Serjeant *Wilde* now shewed cause, on affidavits which stated, that, on the 13th *November* (the day the de-

(*a*) 1 Bos. & Pul. 427.

(*b*) By which it is enacted, "that every bankrupt (having conformed) shall be discharged from all debts by him, her, or them, due or owing at the time he, she, or they, did become bankrupt. And that, in case any such bankrupt shall afterwards be arrested, prosecuted, or impleaded, for any debt due before such time as he, she, or they, became bankrupt, such bankrupt shall be discharged upon common bail."

(*c*) By which it is enacted, "that, any bankrupt who shall, after his certificate shall have been allowed, be arrested, or have any action brought against him, for any debt, claim, or demand, thereby made proveable under the commission of such bankrupt, shall be discharged upon common bail."

fendants' certificate was allowed), the sheriff's officer entered, by virtue of a warrant on the *fi. fa.*, and seized the hay stack in question, in part execution of the warrant. The learned Serjeant insisted, that, under these circumstances, there could be no ground for this application, the writ of *fieri facias* having been sued out long before the defendants had obtained their certificate, and the levy made under it on the same day. He submitted that the question depended on the 121st section (*a*) of the statute 6 *Geo.* 4, as well as on the 126th; and that the case of *Lister* v. *Mundell* was altogether inapplicable, as those sections vary in terms from 5 *Geo.* 2, c. 30, s. 7, and the 126th section applies only to the discharge of the *person* of a bankrupt arrested, or in custody, after having obtained his certificate; and that here, the plaintiff, as a creditor, had a just demand against the defendants before they obtained their certificate, and the action was properly brought; and as the Court can only interfere in a case of personal arrest, and as the Legislature in passing the statute 6 *Geo.* 4, did not intend that it should apply to property acquired by a party before he obtained his certificate, such property must be available to his creditors for a debt previously due, and which the debtor is morally bound to pay.

Mr. Serjeant *Peake*, in support of his rule.—The provisions of the statute, 6 *Geo.* 4, c. 16, as far as they are applicable to this question, are the same, in effect, as those

(*a*) By which it is enacted, "that, every bankrupt who shall have duly surrendered, and in all things conformed himself to the laws in force concerning bankrupts, at the time of issuing the commission against him, shall be discharged from all *debts* due by him when he became bankrupt, and from all claims and demands thereby made proveable under the commission, in case he shall obtain a certificate of such conformity, so signed and allowed, and subject to such provisions as thereinafter directed."

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in 5 *Geo.* 2, c. 30, and although *goods* taken in execution are not mentioned in the recent act, yet the case of *Lister* v. *Mundell* is an express authority to shew that they fall within it. Here, the property seized was in the possession of the defendants, as in *Lister* v. *Mundell;* and the Court will not try the question whether they have a right to hold it as against their assignees or third persons; but the question is, whether or not they are entitled to have it restored by the party levying, they having obtained their certificate before the levy was made. In *Lister* v. *Mundell*, the application was similar in terms to the present, and Lord Chief Justice *Eyre* there said: "By refusing the application we shall drive the defendant to his *auditâ querelâ*, and I take it to be the modern practice to interpose in a summary way, in all cases where the party would be entitled to relief on an *auditâ querelâ*." The proceeding by *auditâ querelâ* is now become obsolete; and the 121st section of the statute 6 *Geo.* 4, expressly provides that a bankrupt, who shall have obtained his certificate, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands proveable under the commission.

Lord Chief Justice BEST.—I am of opinion, that this application ought not to be granted. No Judge who ever sat in *Westminster Hall* could entertain more respect for the opinions of Lord Chief Justice *Eyre* than I do. He generally acted with great caution; but in *Lister* v. *Mundell* he appears to have come to a too rapid conclusion, when he said, that he took it to be the modern practice to interpose in a summary way, in *all cases* where the party would be entitled to relief on an *auditâ querelâ*. If the circumstances of a case be *perfectly clear*, the Court will not drive a party to the expence of suing out such writ, but will relieve him on motion. The proceeding by *auditâ querelâ* is by no means obsolete;

for in *Hewes* v. *Mott*, and *Dalby* v. *Mott* (*a*), where bail, being fixed with the debt, and having paid it, sued the principal, and obtained judgment after a commission of bankrupt had issued against him, but before he had obtained his certificate; and, after he had got it, the bail in the second action applied to be exonerated, on the ground that the plaintiffs (the bail in the original action) might prove their debt under the commission, by virtue of the statute 49 *Geo. 3*, c. 121, s. 8, the Court refused to interfere summarily, but left the bail to their writ of *auditâ querelâ;* and during my brother *Onslow's* argument in support of the motion, Lord Chief Justice *Gibbs* said: "This application is in the shape of an *auditâ querelâ.* Why did not the defendant avail himself of it as a defence to the action?" And afterwards, in delivering the opinion of the Court, he said (*b*), "we are quite clear, that if the defendant have any remedy, he ought to avail himself of it by *auditâ querelâ.* The Court will never decide this on a summary motion, without giving the other party an opportunity of bringing his writ of error." So, if we were now to decide this matter on motion, although we might draw a wrong conclusion, there could be no appeal to any other Court to correct our judgment; whereas, if we leave the defendants to their *auditâ querelâ*, they may bring a writ of error. The principle on which I ground my opinion is, that, in a doubtful case, the Court ought not to decide on motion; and it appears to me, that this case involves a question of some difficulty, as it depends on the construction of a recent act of Parliament. I think the defendants are not entitled to any relief under the 126th section of the act; if they are entitled at all, it must be under the 121st; and it has been contended, that, as the defendants were thereby discharged from *all debts* due

(*a*) 2 Marsh. 37; *S. C.* 6 Taunt. 329. (*b*) 2 Marsh. 38.

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by them when they became bankrupts, and from all claims made proveable under the commission, their *goods* were protected, and should not have been taken under the execution. But, were the goods their's? I am strongly inclined to think they were not. Was not the hay-stack the property of their assignees? If it were, they might bring an action for its value. It appears to me, that the Legislature only intended to afford relief to the *person* of the bankrupt, and not to his *property*. It is quite clear, that the 126th section applies only to his discharge from arrest, after allowance of his certificate; and although he may be discharged from all debts due by him when he became bankrupt, yet his property, from that moment, was vested in his assignees. If it had been intended that a case of this description should fall within the meaning of the act, it would have been expressly provided for: but no such provision is made.

Mr. Justice PARK.—The 126th section of the statute 6 *Geo.* 4, is in effect the same as the 7th section of the 5 *Geo.* 2, c. 30; and the 121st section of the 6 *Geo.* 4, is also a re-enactment of the former part of s. 7 in the 5 *Geo.* 2. If the case of *Lister* v. *Mundell* had not stood in our way, I should have felt no difficulty; and although Lord Chief Justice *Eyre* there thought that the Court might give that relief, in a summary way, which might be obtained by *auditâ querelâ*, yet, with the greatest possible deference to whatever fell from him, I cannot but doubt that position. I fully agree with my Lord Chief Justice, that, if a clear case be brought before the Court, the party applying is entitled to relief on motion: but the construction to be put on the 121st section of the statute is not free from doubt. The 126th only relates to the discharge of the *person* of a bankrupt arrested and in custody; and although the 121st section may apply to his *debts*, yet his goods, from the time

he became bankrupt, must be vested in his assignees, who are consequently empowered to claim them; and, therefore, the defendants are not entitled to the relief sought by this application.

Mr. Justice BURROUGH.—I concur in thinking that the defendants cannot succeed on the present motion, as a doubt arises on the face of the statute. Besides, I have another difficulty, as it appears that the levy was made on the same day the certificate was allowed. It is therefore doubtful which had the priority. I remember a case, where Lord *Eldon* was called out of his bed, on an occasion of urgent necessity, for the purpose of sealing a commission.

Mr. Justice GASELEE.—I am quite clear, that this case is not within the 126th section of the statute, as that clause applies only to the *person* of the bankrupt; and as I entertain considerable doubt as to the proper construction to be put on the 121st, and as no question seems to have yet arisen on it, I fully concur with the Court in thinking, that the defendants must be left to their remedy by *auditâ querelâ*.

Rule discharged, without costs (*a*).

(*a*) See the case of Lord *Portchester* v. *Petrie*, 2 Wms. Saund. 4th Edit. 148 b, where the proceedings on an *auditâ querelâ* are set out, and all the authorities collected. See, also, *Giles* v. *Nathan*, 1 Marsh. 226; *S. C.* 5 Taunt. 558.

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The defendant, and *C. M.*, his partner, having an account with the plaintiffs, who were bankers, *C. M.* gave them his promissory note for 2000*l.* that they might be allowed to overdraw the partnership account. *C. M.* afterwards required from the defendant, his note for 1000*l.*, to indemnify him for a moiety of the sum for which he had thus become separately responsible to the plaintiffs, and, having obtained it, he indorsed and gave it to the plaintiffs. The firm subsequently becoming indebted to the plaintiffs, for advances, to the amount of 1,300*l.*, they sued the defendant on his note: —Held, that they were entitled to recover.

THIS was an action of *assumpsit*. The declaration contained counts on the promissory note for 1000*l.*, set out below, together with the usual money counts. The particulars of demand, delivered by the plaintiffs under a Judge's order, were as follows: "the plaintiffs seek to recover the whole principal and interest upon the promissory note mentioned in the declaration, and the other counts are in support of the plaintiffs' claim."

At the trial, at the *Spring* Assizes, 1827, for the county of *Lancaster*, before Mr. Baron *Hullock*, a verdict was found for the plaintiffs, for the sum of 1000*l.* on the counts upon the note, subject to the opinion of the Court upon the following case:—

"The plaintiffs are bankers at *Liverpool*, the defendant is a merchant there. In the year 1815, the defendant entered into partnership with *Cyrus Morrall*, the payee of the promissory note on which this action is brought, under the firm of *Morrall & Watson*. On the 9th *February*, 1824, the said partnership obtained from the plaintiffs, who were their bankers, permission to overdraw their banking account with the plaintiffs, and *Morrall* gave to the plaintiffs, as collateral security for the said advances, his separate promissory note, for 2000*l.*, which is as follows:

"'*Liverpool*, 9th *February*, 1824.

"'On demand, I pay to *Arthur Heywood*, Esq., *Sons*, & *Co.* (the said plaintiffs), or order, two thousand pounds, value received.

C. Morrall.'

"On the 10th *February*, 1824, the defendant, for the purpose hereinafter mentioned, drew the promissory note on which this action was brought, which is as follows:

" ' *Liverpool*, 10th *February*, 1824.

" ' On demand, I promise to pay *Cyrus Morrall*, or order, 1000*l*., value received.

Thomas Wright Watson.'

Indorsed, *Cyrus Morrall.*'

" No evidence was given of express notice to, or express knowledge by, the plaintiffs, of the purpose for which this note was drawn, or of the letter, dated 10th *February*, hereinafter mentioned. On the said 10th *February*, 1824, the defendant sent the last-mentioned promissory note to *Morrall*, enclosed in a letter addressed to him, in which the defendant stated, that he deposited with him (*Morrall*) the note in question, to meet his (*Morrall's*) collateral security, given, in the said note for 2000*l*., to the plaintiffs for the said advances, and to secure to *Morrall* repayment of his, the defendant's, moiety of that sum, or of such sum as *Morrall*, individually, should have to pay the plaintiffs on the joint account of himself (*Morrall*) and the defendant.

" The partnership of *Morrall & Watson* terminated on the 28th of *February*, 1825.

" The plaintiffs proved that they were possessed, before *June*, 1826, of the note indorsed by *Morrall* to them; but it did not appear how much sooner they were so possessed, or when it was indorsed by *Morrall*. No consideration for such indorsement was proved, nor any application to *Morrall*, previous to such indorsement, for payment of his said note for 2000*l*., nor for the payment of the said advances. Neither the said last-mentioned note, nor the said advances, or any part thereof, have been paid by *Morrall;* but the same note remains unsatisfied in the plaintiff's hands. The plaintiffs have not made any advances, on account of the partnership of *Morrall & Watson*, since the termination of the partnership; and neither *Morrall*, nor the defendant, was, at the time when the note came into the plaintiffs' possession, indebted to the plain-

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tiffs, nor has either of them since become indebted to the plaintiffs, on his separate account, unless the Court should be of opinion that the defendant, as maker of the said note, was, under the circumstances of this case, indebted to the plaintiffs as indorsees thereof. The plaintiffs are *Morrall's* bankers. The said advances amounted to 1,300*l.* which is still unpaid. They were made to the partnership of *Morrall & Watson*, or on their account jointly, and not to *Morrall* on his account separately, and are so debited in the plaintiffs' books.

"The question for the opinion of the Court is, whether the plaintiffs are entitled to recover the said sum of 1000*l.* or any part thereof, on the said counts on the note, or not. If the Court should be of opinion that they are so entitled, the verdict is to stand: if not, a nonsuit is to be entered."

Mr. Serjeant *Russell*, for the plaintiffs—after submitting that they were not to be affected by the circumstances under which the defendant's note was drawn, or the terms on which *Morrall* had obtained it from him, as there was no evidence of these facts being known to them—was stopped by the Court, who called on

Mr. Serjeant *Wilde*, for the defendant.—The only point is, whether the plaintiffs are holders of the note in question, so as to entitle them to recover upon it, as against the defendant. The inference of law, arising from the facts as stated in the case, is, that this action cannot be maintained. It has been said, that the plaintiffs had no notice of the circumstances under which the note was made, or came into *Morrall's* hands. The words of the case are, "no evidence was given of *express* notice to, or *express* knowledge by, the plaintiffs, of the purpose for which the note was drawn." But there were sufficient circumstances connected with it, to cause them to make an

enquiry, and they should have used due diligence, and endeavoured to obtain a knowledge of the fact, as to how, and for what purpose, it came to the possession of *Morrall*. It was made for 1000*l*. payable *without interest*. That was not only against the usual course of business, but was a circumstance, which, from the largeness of the amount, must have conveyed to the minds of holders, that the right of *Morrall*, the payee, was not unqualified. It appears that he held the note from *February*, 1824, to 1826, without having demanded or received *any interest*, although it was payable on demand, and for so large a sum as 1000*l*. The plaintiffs did not prove that they were holders for value, and it is stated as a fact, that when the note came into their possession, neither *Morrall* nor the defendant was indebted to them, nor had either of them since become indebted on his separate account, unless the defendant, as maker, was indebted to the plaintiffs as indorsees of the note. It is clear, that *Morrall* could not have recovered on the note, as against the defendant, as it was given to him by way of indemnity only; and, until he was actually damnified, he had no right to claim. The defendant's letter shews, that the note was given to *Morrall* as a collateral security for his liability on the note for 2000*l*.; and no application was made by the plaintiffs to *Morrall*, for the payment of that note; and if *Morrall* could not recover as against the defendant, the plaintiffs cannot be placed in a better situation than he stood in. It is therefore clear, that this action is only an attempt, on the part of *Morrall*, to get through the plaintiffs, as his bankers, a larger sum than he himself could, under any circumstances, have recovered from the defendant. If a person use, or pass off to another, a negotiable security absolutely, when it is deposited with him by way of indemnity only, he is guilty of a fraud; and notwithstanding that the party receiving it is ignorant of that fact, yet, to entitle him to sue on it, he must be a holder for a valuable consideration; and here, no consideration for

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Morrall's indorsement to the plaintiffs was proved, nor was any application previously made to him for payment of his note for 2000*l.* If an individual, to whom a bill or note is indorsed, have notice that the payee or indorsee holds it merely as an indemnity, and receive it with such notice, he is not a *bonâ fide* holder; and here, the plaintiffs not only received the note from *Morrall* two years after it was drawn, but they proved no consideration for his indorsement. They were *Morrall's* bankers, and his securities were, in all probability, deposited with them as such; and if so, the fact of their having the defendant's note in their possession, may more naturally be referred to their holding it as *Morrall's* bankers or agents, than to their holding it as indorsees. If even they had been holders for value, and they had had notice of the origin of the note, and the purpose for which it was made, they could not be said to be *bonâ fide* possessed of it. There was not only no consideration proved, but there is no room even for an inference of a consideration; for, although the plaintiffs, as bankers, might have had the note in their possession as holders for value, yet they did not shew that they were such holders. On the whole, therefore, it must be inferred, that the plaintiffs held the defendant's note in their character of bankers for *Morrall*, and not for any advances made to him, either individually, or on the partnership account. He had no power to convey an absolute right, he having a mere qualified interest in the note; and although the plaintiffs need not have enquired as to the circumstances attending the making of the note, they should, at all events, have shewn that they received it from *Morrall*, for a valuable consideration; and the mere fact of possession does not import a title in them to sue the defendant, they having made no demand on *Morrall* for payment of his note for 2000*l.*, nor for advances made previously to their receiving the note of the defendant.

Lord Chief Justice BEST.—When all the facts of this

case are looked at, it appears to me that there is abundant consideration to support this action. The plaintiffs were bankers: the defendant and *Morrall* being in partnership, banked with them, and overdrew their account to the amount of 1300*l.* In order to induce the plaintiffs to allow the account to be overdrawn in the first instance, *Morrall* gave them his promissory note for 2000*l.* and afterwards required from his partner, the defendant, his note of hand for 1000*l.* as an indemnity for the one half of his, *Morrall's*, liability to the plaintiffs for the said sum of 2000*l.* This note *Morrall* afterwards indorsed and gave to the plaintiffs. It has been said, that it might have been deposited with them in their character of bankers, for safe custody, and not paid to them for a *bonâ fide* consideration, or actual advance. If that fact had appeared in the case, it would have been a very different question, but it is not so found. The bankers held it as a note on which they were entitled to sue. It has also been said, that *Morrall* could not sue the defendant on this note. It is unnecessary to enquire into that fact, as his right cannot affect the present plaintiffs; for, if there were a good consideration between them, as bankers, and *Morrall*, it is sufficient for the purposes of this action. It appears that they were ignorant of the circumstances under which *Morrall* had taken the note from the defendant, for it is stated that no evidence was given of express knowledge by the plaintiffs of the purpose for which the note was drawn. And if it were given under such circumstances as would prevent them from being entitled to sue on it, it was incumbent on the defendant to have shewn that those circumstances had reached the knowledge of the plaintiffs before they received the note; but, for any thing that appears to the contrary, it came to their hands for a good consideration. I am of opinion, that, even if the plaintiffs had been made acquainted with all the facts as stated in the case, it would not have prevented them from suing the defendant. They held *Morrall's* note as a security for

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2000*l.*, and they also had the security of the defendant's note for 1000*l.*; and as they had a right to sue *Morrall* on his note, so they had an equal right to sue the defendant on his, which *Morrall* handed over to them as a further or additional security; and for which purpose it was deposited by the defendant with *Morrall*. Although the defendant is now called upon to pay a larger proportion of the sum due from him and *Morrall* jointly, than his moiety of the account overdrawn, yet the hardship on him might have been greater; for if the plaintiffs had brought a joint action for the recovery of the whole balance of 1,300*l.*, they might have issued execution against the defendant alone, and then, as in the present case, he would have had to sue *Morrall* for contribution. But that has nothing to do with the plaintiff's right to sue the defendant on his note. I am satisfied that they are entitled to retain their verdict; and I lament that they have, by this special case, necessarily suffered so great a delay in obtaining the fruits of it. There is a rule in this Court, that if a special case be made at *Nisi Prius*, it must be set down for argument within the first *four* days of the Term succeeding the trial (*a*), and it would be extremely beneficial if that rule were put in force.

Mr. Justice PARK.—This is an action brought by the indorsees against the maker of a promissory note, for 1000*l.*, payable to the order of *Morrall*, and indorsed by him to the plaintiffs, who were his bankers. They had a *primâ facie* right to sue on it, and it was only incumbent on them, at the trial, to prove the hand-writing of the defendant and *Morrall*. It has been objected, that, although the case states that there was no evidence of *express* notice to, or *express* knowledge by, the plaintiffs of the purpose for which the note was drawn, or given by the defendant to *Morrall*, yet that the nature of the whole of the transaction

(*a*) See Tidd's Practice, 8th Edit. 510.

was such as to raise a strong presumption that they were not ignorant of it altogether, the note having been given in 1824, and not shewn to be transferred to them till 1826; that, it having been given merely by way of indemnifying *Morrall* for the defendant's share of the account over-drawn, it could not be considered a negotiable instrument; that, as *Morrall* himself had not been called upon to pay any thing on account of the sum for the securing of which his note was given, he could not call upon the defendant; and that the note of the latter was not transferable, and, consequently, that the plaintiffs were not entitled to recover upon it; and much stress has been laid upon the bill's being payable *without interest*, and having been permitted to remain unnoticed so long, it being dated in *February*, 1824, and this action not having been tried till *August*, 1827. But I am clearly of opinion, that none of these circumstances in any degree affect the plaintiffs' right, as, even if they had been aware of all the facts stated in the case, it would not amount to a sufficient defence against their right to recover as indorsees; and, as it is expressly stated that they had no knowledge of the purpose for which the note was drawn, or given to *Morrall*, who indorsed it to them, the verdict is perfectly right, and ought not to be disturbed.

Mr. Justice BURROUGH.—If the observations now made at the bar had been addressed to the Jury, they might possibly have had some weight, but we can only look at the facts as they appear in the case. I can see no ground for supposing that the plaintiffs were not the *bonâ fide* holders of the note, and, as such, entitled at law to sue on it.

Mr. Justice GASELEE.—It is not necessary to enquire whether the plaintiffs had notice of the circumstances under which the note was made or given by the defendant

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to *Morrall*, or what relief the defendant may be entitled to, as against the latter, either in a Court of Equity, or of law, for contribution. But, on the facts as stated to us, there can be no doubt but that the plaintiffs are entitled to maintain this action. The circumstance, that *Morrall's* note is dated on the 7th *February*, 1824, and the defendant's on the day following, is extremely strong, to shew that they were both given in relation to the over-drawing their banking account with the plaintiffs; and if so, it is quite clear that the latter were entitled to apply the note in question to the advances made to *Morrall* and the defendant, on the partnership account.

Postea to the plaintiffs.

Friday, Feb. 1st.

To a declaration in debt, containing several common counts, and concluding "to the plaintiff's damage of 10*l.*" the sum demanded at the commencement being 33*l.*;—the defendant pleaded—that he did not owe the plaintiff the said sum of 10*l.* *above demanded*, or any part thereof:—The plaintiff having signed judgment as for want of a plea, the Court set it aside without costs, the defendant undertaking to bring no action.

EDGINGTON *v.* TOWN.

THIS was an action of debt. The declaration contained six counts, *viz.* two for goods sold and delivered, one for money paid, one for money borrowed, one for money had and received, and an account stated; in each of which a debt was stated to be due from the defendant to the plaintiff of 5*l.* 10*s.* 2*d.*; and the sum demanded, at the commencement of the declaration, was 33*l.* 1*s.*, and it concluded to the plaintiff's damage of 10*l.* Plea, —That the defendant *did not owe to the plaintiff the said sum of* 10*l.* *above demanded, or any part thereof, modo et formâ*, and concluding to the country. The declaration was filed in *Easter* Term last; and the above plea was *delivered in due time, viz.* on the 22nd *May*. The defendant's attorney heard nothing farther of the action till the last day of the last Term, when he received a letter from the plaintiff's attorney, stating, that, unless the debt and costs on the judgment were paid within a week, execution would be issued for the same, and that, on the

defendant's attorney calling on the attorney for the plaintiff a day or two afterwards, the latter stated that he had signed judgment, as he had been advised that the plea was a nullity; and execution was afterwards sued out, and the debt and costs levied under it. On an affidavit of these facts, and that the defendant had a good defence on the merits—

Mr. Serjeant *E. Lawes*, on a former day in this Term, obtained a rule *nisi*, that the judgment and execution issued thereon might be set aside for irregularity, and that the money levied under the execution might be restored to the defendant. The learned Serjeant relied on the case of *Attwood* v. *Bonacich* (*a*), where a plea, in debt, that the defendant did not owe the said sum of 10*l.* *above demanded*, (the sum demanded being 1800*l.*), was held sufficient; and Lord Chief Justice *Abbott* said, "the words 'ten pouds' may be rejected as surplusage." At all events, the plaintiff ought to have demurred to the plea, and not signed judgment, which is clearly irregular.

Mr. Serjeant *Wilde* now shewed cause, and submitted, that the plea was a nullity, on the authority of *Macdonnell* v. *Macdonnell* (*b*), where it was held, that, if a declaration in debt demand 2000*l.*, and contain several counts, each of which states a debt of 224*l.* 7*s.* 4½*d.*, and the defendant plead thereto, that he does not owe the said sum of 224*l.* 7*s.* 4½*d.*, the plaintiff may sign judgment for want of a plea. That case was not adverted to in *Attwood* v. *Bonacich*, which is distinguishable, as there issue was joined, and the plaintiff applied for the defendant to amend his plea; and it is now an established principle, that, where a plea is informal on the face of it, or is so framed as to make it necessary for the plaintiff to consult

(*a*) 1 Dow. & Ryl. 473. (*b*) 3 Bos. & Pul. 174.

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counsel, he may treat it as a nullity and sign judgment as for want of a plea. And here the plea, instead of denying the debt demanded, denies that the defendant owes the sum of 10*l.* *above demanded*, when in fact no such sum was demanded, it being merely the amount of the damage laid.

Mr. Serjeant *E. Lawes*, in support of his rule.—The case of *Macdonnell* v. *Macdonnell* is altogether distinguishable from *Attwood* v. *Bonacich;* and, according to the latter, the plaintiff should have demurred, and not signed judgment. In *Macdonnell* v. *Macdonnell*, the words *above demanded* were not introduced in the plea, as in *Attwood* v. *Bonacich*, where, after issue joined, and notice of trial given, the plaintiff applied for a rule, that, unless the defendant would alter his plea, the plaintiff should be allowed to sign judgment, or that the defendant might amend his plea, and go to trial; and the Court would not allow the latter part of the application, but gave the plaintiff leave to withdraw the *similiter*, and demur; and Lord Chief Justice *Abbott* there said, "if the plaintiff wishes to withdraw his *similiter*, and demur to the plea, the Court will grant him that permission. I am inclined to think, that the plea is sufficient to meet the declaration, it being sufficiently covered by the averment, that the defendant does not owe the money *above demanded*, and that the words, 'ten pounds,' may be rejected as surplusage." That is expressly in point to shew, that the plaintiff could not treat the plea as a nullity, and sign judgment. Besides, the defendant has sworn that he has a good defence to the action, on the merits.

The Court were of opinion, that, under all the circumstances, the judgment ought to be set aside, without costs, the defendant undertaking to bring no action. On these terms—

Rule absolute.

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Friday, Feb. 1st.

WILCOXON *v.* NIGHTINGALE, Bart.

[M. T. 8 *G.* 4. Roll 361.]

On demurrer to a declaration against the sheriff, for an escape on mesne process, assigning for cause, that it was not alleged that any affidavit of the plaintiff's cause of action was made, or filed:—Held, that such allegation was unnecessary, it being averred, that the writ was *duly marked or indorsed for bail*, before it was delivered to the sheriff.

THIS was an action on the case, against the sheriff of *Cambridgeshire*, for an escape. The declaration was entitled of *Michaelmas* Term, 8 *Geo.* 4.—The *first* count stated, that, on the 22d *September*, 1825, one *J. W. Kirk* was indebted to the plaintiffs in the sum of 50*l.*; and that being so indebted, the plaintiffs, *on the day and year aforesaid*, for the recovery of their said debt, sued and prosecuted out of this Court, a writ of *capias ad respondendum* against *Kirk*, directed to the sheriff of *Cambridgeshire*, &c. &c.; that the writ, afterwards, and before the delivery thereof to the said sheriff to be executed, to wit, on &c., at &c., *was duly marked or indorsed for bail, for 25l. and upwards;* that the said writ, so indorsed, afterwards, and before the return thereof, to wit, on &c., was delivered to the defendant, who then, and from thence, and until, &c., was sheriff of the said county of *Cambridge*, to be executed, &c.; that, by virtue of the said writ, the defendant, afterwards, and before the return of the said writ, to wit, on &c., took and arrested *Kirk*, but afterwards, to wit, on &c., voluntarily suffered him to escape and go at large, the debt for which he was arrested remaining unpaid. It was then averred, that *Kirk* did not appear at the return of the writ, whereby the plaintiffs were delayed in the recovery of their said debt, and put to costs, &c.

The *second* count was for not arresting *Kirk;* and, the *third*, for not assigning the bail-bond; in both of which it was stated, that the writ delivered to the sheriff *was duly marked or indorsed for bail.*

The defendant demurred specially to the first count, assigning for causes:—"That, by an act of Parliament, passed in the *twelfth* year of the reign of his late Majesty, King *George* the *First*, chapter *twenty-nine;* amended by

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another statute, enacted in the *fifth* year of the reign of his late Majesty, King *George* the *Second*, chapter *twenty-seven;* made perpetual by the statute passed in the *twenty-first* year of the reign of his said late Majesty, King *George* the *Second*, chapter *three*, it is enacted, that, in all cases where the plaintiff's cause of action shall amount to the sum of 10*l.* and upwards, *an affidavit shall be made and filed of such cause of action;* and for the sum or sums specified in the said affidavit, and no more, the sheriff, or other officer to whom such writ or process shall be directed, shall take bail; and if no such affidavit shall be made as aforesaid, the plaintiff, or plaintiffs, shall not proceed to arrest the body of the defendant, but proceed in the like manner as was directed by the said statute of the *twelfth* year of the reign of King *George* the *First*, in cases where the cause of action did not amount to *ten* pounds or upwards; nevertheless, it is no where in the said *first* count of the declaration alleged, that any affidavit of the supposed cause of action, in the said *first* count set forth, was ever made, nor, if made, that it was filed in this Court; nor, if so made and filed, to what amount the affidavit specified the said supposed cause of action.

And also, for that the declaration is entitled of *Michaelmas* Term, in the *eighth* year of the reign of King *George* the *Fourth*, that is to say, in the year 1827; and the said supposed cause of action is stated to have accrued on the 22d *September*, 1825; and the supposed writ, alleged to be prosecuted out of this Court, is stated to have been sued out on the day and year aforesaid, but does not state which of the before-mentioned years, 1827 or 1825."

There were similar demurrers to the second and last counts, and the plaintiff joined in demurrer.

The cause now came on for argument.

Mr. Serjeant *Storks*, in support of the demurrer.—Neither of the counts of the declaration avers, that the writ was indorsed for bail, *by virtue of an affidavit of the*

cause of action for the sum specified, *before then made and duly filed*, as required by the statute 12 *Geo.* 1, c. 29. It is a general principle, that, in all actions against sheriffs, and other officers, for negligence or breach of duty, it is necessary to shew strictly the obligation of the defendant. In *Barns* v. *Eyles* (*a*), where, in an action of debt, against the Warden of the *Fleet*, for an escape, the bill alleged, that the prisoner was brought to the bar of this Court by the defendant, by virtue of a writ of *habeas corpus*, and was, by the same Court, re-committed to prison, in execution, " as by the said commitment more fully and at large appears." On special demurrer, assigning for cause, that it was not averred in the bill that the commitment was of record:—the Court thought that such omission was bad; but, as the objection was not raised until after verdict, they allowed the plaintiff to amend, on payment of costs. And in *Stovin* v. *Perring* (*b*), an action against the sheriff, for an escape on mesne process, it appeared, that the writ was issued from this Court, and the declaration averred, that the defendant " had not the body before our said lord the King" on the return day; to which there was a special demurrer, assigning for cause, that it was not stated that the defendant " had not the body *before our said lord the King's Justices at Westminster*," at the return of the writ; and the Court held, that the declaration was bad. Although, in a declaration on a bail bond, it is not necessary to set forth that there was an affidavit of debt, or that the sum sworn to was indorsed on the writ, *Whiskard* v. *Wilder* (*c*); or to prove, in an action for maliciously holding to bail, that there was any affidavit of debt, as the indorsement on the writ is sufficient, *Croke* v. *Dowling* (*d*); yet a greater degree of

(*a*) 2 B. Moore, 561; *S. C.* 8 Taunt. 512; see also *Turner* v. *Eyles*, 3 Bos. & Pul. 456.

(*b*) 2 Bos. & Pul. 561.

(*c*) 1 Burr. 330.

(*d*) Bull. Ni. Pri. 7th Edit. by Bridgman, 14.

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precision is necessary in an action against a sheriff, or public officer, for a breach of duty; and in *Casburn* v. *Reid* (*a*), which was an action against a sheriff for an escape, the declaration averred, that the writ was indorsed for bail, by virtue of an affidavit of the plaintiff's cause of action, before then made and duly filed of record; and the Court held, that the production of an office copy of the affidavit was sufficient to prove such averment; and here, the fact of an affidavit of the amount of the debt, *filed of record*, was necessary to enable the sheriff to arrest *Kirk* at the suit of the plaintiff, otherwise the arrest would have been illegal, as being founded *upon a void process;* and the rule is, that the sheriff cannot excuse himself, because the process is *erroneous;* though he may, if it be *void*. The plaintiff was bound to set out on the record, and to prove, that he had complied, in all respects, with his duty, before he could complain of the misconduct or breach of duty of the sheriff. Another ground of objection to the declaration is, that it is entitled of *Michaelmas* Term, 8 *Geo.* 4 (1827), and the plaintiff's cause of action is stated to have accrued on the 22d *September*, 1825; and the writ is alleged to have been sued out on *the day and year aforesaid*, without stating in which of the years, *viz.* 1825, or 1827.

Mr. Serjeant *Russell, contrà*, was stopped by the Court.

Lord Chief Justice BEST.—As the declaration is entitled generally of *Michaelmas* Term, 8 *Geo.* 4, there is no ground for the last objection; it has been said, however, that the declaration is insufficient, as it does not state, that an affidavit of the plaintiff's original cause of action was made and filed. No cases have been cited to prove, that such an allegation is necessary, and the authorities to

(*a*) 2 B. Moore, 60.

which we have been referred, only tend to shew, that, if such an averment be introduced, it must be proved. By the statute, 12 *Geo.* 1, c. 29, s. 2, it is enacted, that, from and after the 24th *June*, 1726, in all cases where the plaintiff's cause of action shall amount to *ten* pounds, or upwards, affidavit shall be made and filed of such cause of action (which affidavit may be made before any Judge, or Commissioner of the Court, out of which such process shall issue, authorized to take affidavits in such Courts, or else before the officer who shall issue such process, or his deputy, which oath, such officer, or his deputy, is thereby empowered to administer); and that, for such affidavit, one shilling, over and above the stamp duties, shall be paid, and no more; and that the sum, or sums, specified in such affidavit, shall be indorsed on the back of such writ or process. Why indorsed? By way of direction to the sheriff to take bail for the sum or sums so indorsed; he has nothing to do with the affidavit. All he has to look to, is, the indorsement at the back of the writ, and it is impossible for him to know whether the affidavit has been filed or not, unless he search the office; and a bailable writ cannot be issued, unless such an affidavit be previously made. The case of *Casburn* v. *Reid*, appears to me to have been most properly decided, as there the plaintiff averred in his declaration, that the writ was indorsed for bail, by virtue of an affidavit filed of record; and although such an averment was unnecessary, yet, having introduced it, he was bound to prove it; and Mr. Justice *Dallas* there referred to *Croke* v. *Dowling*, where, in an action for maliciously holding to bail, the Court held, that it was not necessary to prove that there was any affidavit to hold to bail, as the indorsement on the writ was sufficient; and here the plaintiff has alleged, that the writ was duly marked or indorsed for bail. That appears to me to be sufficient; and although the affidavit must be made and fil-

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ed, before the writ is sued out, it need not be stated in the declaration. I am therefore of opinion, that there must be judgment for the plaintiff.

Mr. Justice PARK.—I am of the same opinion. It is not necessary to state that an affidavit was made and filed of record; the books contain precedents both ways; and here the declaration appears to me to be sufficient, as it alleges, that the writ was duly indorsed for bail. If the plaintiff had gone further, and stated that it was indorsed by virtue of an affidavit, made and filed of record, as in *Casburn* v. *Reid*, he would have been bound to prove it; and in *Croke* v. *Dowling*, the Court said, that, if the declaration had averred, that such an affidavit had been made, an office copy would have been sufficient evidence of it. I therefore think that the objection raised by the defendant is not only frivolous, but would tend to burthen the plaintiff's proof, if it should be allowed to prevail.

Mr. Justice BURROUGH.—The statute requires, that, where the plaintiff's cause of action amounts to 10*l.* or upwards, an affidavit shall be made and filed, and the sum specified in such affidavit indorsed on the back of the writ. It was therefore enough for the plaintiff in this case, to prove that the writ had been marked or indorsed for bail, and he averred in his declaration, that it had been duly marked or indorsed. A declaration need only contain allegations to a certain general intent, and a plaintiff is not bound to set out a fact, unless it be a material point of his case; and here, as he has not alleged that the writ was indorsed by virtue of an affidavit, he was not bound to prove it, nor was it necessary for him to allege it, as the indorsement on the writ is all the sheriff is bound to look at.

Mr. Justice GASELEE.—In *Casburn* v. *Reid*, the case

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of *Webb* v. *Herne* (*a*), was referred to, where, in an action for an escape, the plaintiff averred in his declaration, that *J. S.* was arrested under a writ indorsed for bail, by virtue of an affidavit now of record; and the Court held, that he must produce the affidavit in evidence; although the latter part of the averment was unnecessary: and Mr. Justice *Buller* said: "I remember a case, in Lord *Mansfield*'s time, where it was held unnecessary to produce the affidavit; but the declaration there differed from the present one, since it only stated generally, that a writ was sued out, 'indorsed for bail for £—.'" If the precedents had been uniform in this respect, there might have been some weight in the objection, but I have looked into several, in some of which, the averment, that the writ was indorsed for bail, by virtue of an affidavit made and filed of record, has been introduced, and in others it has been omitted; and I concur with the Court in thinking, that the declaration in this case is sufficient, the plaintiff having averred that the writ was duly indorsed for bail.

Judgment for the plaintiff.

(*a*) 1 Bos. & Pul. 281.

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Monday, Feb. 4th.

In an action of replevin, it was agreed between the plaintiff and defendant, *without the knowledge or concurrence of the sureties in the replevin-bond*, that the cause, and all matters in difference between them, should be referred to an arbitrator, *and that the replevin-bond should stand as a security for such sum as should be found to be due*:—Held, that the sureties were discharged.

THIS was an action of *replevin*, and tried before the Lord Chief Baron at the last *Spring* Assizes, for the county of *Hertford*, when a verdict was found for the plaintiff for *four* guineas, the expenses of the replevin-bond. In the last *Easter* Term, a rule *nisi* was obtained to set aside that verdict, which rule came on to be argued in the *Trin-*

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ity Term following, when the Court ordered, that the verdict should be set aside, and a new trial had, upon payment by the defendant to the plaintiff of the costs of the trial and of the motion, and that the defendant should be at liberty to amend or add avowries; or that, if the defendant would consent to refer it to an arbitrator to ascertain what was due, for rent, to the defendant, the rule should be discharged; and that, in that case, upon payment of costs by the defendant, it should be referred to arbitration; and that the costs of the reference should be in the discretion of the arbitrator; and *that the replevin bond should stand as a security for such sum as should be by him found to be due.* In pursuance of the above rule, the plaintiff consented to a reference, and an order was accordingly made by Mr. Justice *Gaselee*, by which it was ordered, that it should be referred to a barrister, to ascertain the amount of rent due from the plaintiff to the defendant, and to decide all other matters in difference between the parties. The plaintiff's costs were shortly afterwards *taxed* by the Prothonotary, and *paid* by the defendant, and final judgment was signed by the plaintiff. In pursuance of the above order, the arbitrator, on the 27th *September* last, made his award, whereby he found that the rent due from the plaintiff to the defendant (giving the plaintiff credit for certain sums, claimed to be due to him, from the defendant, by way of set-off,) amounted to the sum of 556*l.*; and he further awarded that each party should pay his own expenses of the reference. The order of reference was, in the last Term, made a rule of Court, and the plaintiff became insolvent.

In the last Term, a rule was obtained by Mr. Serjeant *Taddy*, on an affidavit of these facts, calling on the plaintiff to shew cause why the verdict obtained by him

should not be set aside, and why the defendant should not be at liberty to enter a verdict for 55*l.* found to be due to him, for rent, by the award of the arbitrator.

Mr. Serjeant *Wilde*, afterwards shewed cause on behalf of the sureties in the replevin bond, on affidavits, which stated, that final judgment was entered on the *postea* on the 19th of *July* last, when the costs were taxed by the Prothonotary, and that his *allocatur* included the damages given by the Jury on the trial; that on the 9th *August*, the amount of the damages and costs was paid; that *after the taxation*, the attornies for the parties consented to the reference, which was proceeded in before the arbitrator, and agreed to by the defendant's attorney, without requiring or obtaining the concurrence or acquiescence of the sureties in the replevin bond, both of whom swore that they never concurred in, or agreed to be bound by, the decision of the arbitrator, or to permit the replevin-bond to stand as a security for what should be found by an arbitrator to be due, and that, if they had been applied to to become bound, they would not have consented thereto. Under these circumstances, the learned Serjeant submitted that the sureties were discharged from all liability, as the verdict and judgment entered for the plaintiff was a performance of the condition of the replevin-bond; or that, at all events, they were discharged by the reference to arbitration, as the order, that the bond should stand as a security, was made without their knowledge or consent. The bond was only conditioned for a return of the goods, and for prosecuting the suit with effect, which was put an end to by the reference, to which the sureties did not assent, and which would be a complete answer to an action against them on the bond.

Mr. Serjeant *Andrews* appeared for the plaintiff.

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Mr. Serjeant *Taddy*, in support of the rule, contended, that the reference to arbitration did not alter the situation of the sureties, and he relied on the case of *Moore* v. *Bowmaker* (*a*), where it was held, that sureties on a replevin bond are not discharged by time being given to the principal by a reference.

Mr. Justice *Park*.—In that case Lord Chief Justice *Gibbs* drew a distinction between the case of bail and sureties in a replevin-bond, and, when it afterwards came before the Court on demurrer, his Lordship, after time taken for consideration, and stating the *third* plea, which alleged that before judgment obtained all matters in difference between the plaintiff and *J. S.* were referred to arbitration, said (*b*), "it is difficult, in looking through the facts which are alleged in this plea, to see any one of them, which does not operate in favour of the sureties; for all proceedings are stayed in the action of replevin, till the award should be made; there is authority to deduct from the rent whatever is found due on other grounds, which could not have been done in any other course; and there is not a single circumstance in the agreement which does not operate the same way: for the delay of the proceedings is no prejudice to the sureties. The defendant has confounded the case of replevin with that of an arrest, which are perfectly dissimilar. The reason why bail, on an arrest, are discharged by giving time to the principal, is, that their remedy of surrender, which ought always to be kept entire, is taken away. In the case of a replevin-bond, there is no such prejudice; the delay is to the prejudice of the plaintiff alone, and it is no reason for saying that the sureties are discharged, because he has not pressed his suit with all possible diligence." But it appears that the same case

(*a*) 2 Marsh. 81; *S. C.* 6 Taunt. 379; and see *Hallett* v. *Mountstephen*, 2 Dow. & Ryl. 343.

(*b*) 2 Marsh. 397; *S. C.* 7 Taunt. 104.

came afterwards in the *Exchequer Chamber* (*a*), before the late Lord Chief Baron *Richards*, who granted a perpetual injunction to restrain the plaintiff from proceeding against the sureties. It is therefore necessary to look into that case before we give any opinion, and if we feel any difficulty, we will direct this case to be re-argued.

Cur. adv. vult.

Mr. Justice PARK, now delivered the judgment of the Court, as follows:—This was an action of replevin, and the case came before the Court, in the last Term, upon a rule to shew cause why the verdict obtained by the plaintiff, at the preceding *Spring* Assizes for the county of *Herts*, should not be set aside, and why the defendant should not be at liberty to enter a verdict for 556*l*., found to be due to him, for rent, by the award of an arbitrator in the rule named.

This rule was drawn up upon reading the record of *Nisi Prius*, a rule made in this cause on the *Wednesday* preceding, and the affidavit of the attorney for the defendant, the avowant.

Now, in order to understand this case, we must observe, that an application had been made to this Court, to set aside a verdict which the plaintiff in replevin had obtained, upon payment of costs by the defendant, both of the trial and of the then application, and that the defendant should be at liberty *to add other* avowries; but if the plaintiff would consent to refer to any arbitrator, to say what was due for rent, then the rule was to be discharged, upon payment of the costs of the action by the defendant to the plaintiff; and that the costs of the reference should be in the discretion of the arbitrator; and it was further

(*a*) 7 Price, 223.

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stated, *that the replevin bond should stand as a security for such sum as should by him be found to be due.* These last words will be found to be most material; as upon them much of this decision will depend.

After the above rule was made, the parties did agree, and an order was accordingly made, by such agreement, by my Brother *Gaselee*, to refer the matter to a barrister.

Upon this reference, it appears, the learned gentleman, mentioned in the order of Mr. Justice *Gaselee*, proceeded, and found the sum of 556*l.* sterling, to be due from the tenant, the plaintiff, who is *now insolvent*, as it is sworn, and as is probably the case; and the defendant has paid to the plaintiff the costs taxed by the Prothonotary, as one of the above-mentioned rules requires.

It is positively sworn, not only by the attorney for the plaintiff, but by both the sureties in the replevin-bond, that they never were parties to these proceedings; that they were taken and entered into without their privity or concurrence; that if they, the sureties, had been applied to, they would not have consented thereto; and that, by such proceedings having been taken without their consent, they considered themselves discharged from all future liability.

The question is, whether, under the circumstances, *they are* discharged; for there seems no reason to say, that, if they should be so considered by the Court, the principal may not remain liable upon this award. Let us first see, what the condition of a replevin bond is. It is, that the plaintiff, the tenant, shall appear at the next county-court, and prosecute his suit with effect, and without delay, against *C. D.*, the avowant, for taking, and unjustly detaining his cattle, goods, and chattels, and shall make return of the said cattle, goods and chattels, if a return thereof shall be adjudged. This is all the surety undertakes to do, or to see done. This is the only security which, by virtue of the statute 11 *Geo. 2*, c. 19, s. 23, the person granting replevins is authorized to demand; and the only security in-

to which these sureties have entered. But here it is said, that the replevin-bond is to stand as a security, and that the sureties (the principal being insolvent) are bound to pay the whole of this rent, *viz.* 556*l.* The surety says, *non hâc in fœderâ veni;* this is by no means the engagement I entered into: I only undertook that the tenant should prosecute his suit with effect, and without delay; and that return should be made of the goods seized, if a return should be adjudged. Upon the motion, it was urged that the condition of the sureties was not altered by the acceding to an arbitration; and the authority of Lord Chief Justice *Gibbs*, and of the Court of *Common Pleas*, was pressed upon us, as having decided the point: first, in the case of *Moore* v. *Bowmaker* (*a*), where, on a motion, the Court held (Lord Chief Justice *Gibbs* then presiding), that the sureties in a replevin were not discharged by time being given to the plaintiff in replevin, by a reference. That case was so decided in 1815, before any of the present Judges sat in this Court. The same case afterwards came on again, before this Court, upon a demurrer to the pleas of the defendant (*b*), my Brother *Burrough* and I being then Judges; but, the case having been so recently decided by four most eminent persons, and no case having been quoted to the contrary, the judgment was the same way, upon the principle, that the sureties, in order to shew that they ought to be relieved, must convince the Court that *their situation was, in fact,* altered. Even upon the present motion, the cases above mentioned were quoted, and our attention was drawn to no other by counsel on either side, and accordingly we gave judgment against the sureties. But when I went home, upon reference to other cases, with which my

(*a*) 2 Marsh. 81; *S. C.* 6 Taunt. 381.

(*b*) 2 Marsh. 392; *S. C.* 7 Taunt. 97.

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own private memoranda furnished me, I found that the very case of *Moore* v. *Bowmaker*, had been overturned in another place; and that the decision of the Court of *Common Pleas* had been found to be wrong: I therefore stayed the judgment. Upon the above decisions in this Court, it appears that a bill was filed, and that an application was made for an injunction, on the equity side of the Court of *Exchequer* (*a*), to restrain the proceedings in this Court on the replevin-bond; and, after argument by counsel on both sides, that Court unanimously decided, that—the condition of the bond being an undertaking, on the part of the surety, that the principal should prosecute his writ *with effect, and without delay*, and make return of the goods seized, if so adjudged; and the landlord and tenant having, unknown to the surety, and without his concurrence, entered into an agreement referring to arbitration, whereby the tenant was precluded from proceeding according to the condition; and thus, by agreeing *to stay all proceedings* pending the arbitration, the tenant was restrained, by the act of the landlord, from doing that which his surety had engaged he should do—when the agreement of reference was executed, the bond, as against the surety, was *functus officio;* and they therefore granted the injunction.

Reflecting, as those who sit here do, what a very eminent person presided in the Court of *Exchequer* at the time of the above decision, the depth and solidity of his learning upon all subjects, particularly upon those connected with a due administration of his high office, the accuracy and correctness of his understanding, and the anxiety with which he investigated every subject that came before him; and the extreme caution with which he arrived at his conclusions; all must agree with me, that any decision of Lord Chief Baron *Thomson* is entitled to the

(*a*) 3 Price, 214.

highest respect and consideration from every Judge, who either now sits, or hereafter shall sit, in *Westminster Hall.*

The same case, however, came on again, upon the merits, before Lord Chief Baron *Richards*, and was ably argued by counsel (*a*); and it appears that he had then the two decisions of the Court of *Common Pleas* fully before him; and, after time taken to consider, his Lordship, after a most elaborate argument, granted a perpetual injunction against the proceedings in this Court: and he thought, that, whether the surety *was in fact* placed in a different situation by what had taken place on the arrangement between the landlord and tenant, was less the question, than whether, by such change of situation, *he might have been prejudiced*, not whether he did *actually* sustain any injury in consequence.

And Lord Chancellor *Eldon*, in pronouncing the judgment of the *House of Lords*, in the case of an appeal from *Ireland, viz.* The Governor and Company of the Bank of *Ireland* v. *Beresford* (*b*), seems to lay down the following position as applicable to all cases of principal and surety, without reference to the subject of bail only. His Lordship says: "With respect to principal and surety in a bond, where the creditor enters into an agreement or binding contract with the principal debtor, to give him further time, without the concurrence of the surety, the surety is discharged; as the creditor, by his new contract, destroys the benefit which the surety had under the former contract; as he puts it out of his own power to make good his engagement to enforce immediate payment from the principal, when the surety would have had a right to require him to do so." So, here, the sureties would have had a right to require the tenant to prosecute his suit with effect, and without delay; but the landlord, by his agreement

(*a*) 7 Price, 223. (*b*) 6 Dow.'s Rep. 238.

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with the tenant, and staying his proceedings, has restrained the sureties from compelling him so to proceed.

I have said, that the cases from the Exchequer were never mentioned to us in the last Term. I presume the learned counsel were not, on either side, apprised that such decisions had taken place on the very point; otherwise, doubtless, our attention would have been called to them. But, having now duly considered them, and the reasons therein contained, we think them more agreeable to the condition of a replevin-bond than the decisions of this Court, and more consonant to the provisions of the statute 11 *Geo. 2*, c. 19, s. 23, and to the general rules respecting principals and sureties, perhaps originally considered in Courts of Equity, but now adopted and acted upon in Courts of Law.

We therefore think that this rule, as far as it affects the sureties, should be discharged; and, though not of much use, it may be absolute against the tenant, who is stated to be insolvent.

Monday, Feb. 4th.

MAGGS, Assignee of THOMAS HOWELL and JOHN HOWELL, the younger, Bankrupts *v.* AMES, Esq.

[M. T. 8 G. 4, Roll. 332.]

The plaintiff declared, that, before the making of the defendant's promise, *A. P.* had been arrested and was in custody at the suit of *T. H.* and *J. H.*, and that, in consideration that they would cause her to be discharged, and take a bill of exchange to be drawn on *A. P.* for the amount of the debt due to *T. H.* and *J. H.*, the defendant undertook to pay the bill in case it should be dishonoured by *A. P.* Pleas—*First*, that the defendant's promise was a special promise for the debt of another, and that no agreement relating to the cause of action, nor any memorandum or note thereof, wherein the consideration for the promise was stated or shewn, was in writing, or was signed by the defendant or by any other person by him authorised; and *secondly*, that, before *A. P.* was indebted to *T. H.* and *J. H.*, and from thence until the making of the promise, *A. P.* was the wife of one *W. P.*, and that he was still alive. On demurrer, assigning for cause that the pleas amounted to the general issue and tended to prolixity of pleading:—Held good, as there was no denial of the plaintiff's right of action, or of the facts stated in the declaration, but was matter of defence in law, arising out of the statute of frauds.

THIS was an action of *assumpsit*. The *first* count of the declaration stated,—That, before and at the time of mak-

ing the promise and undertaking of the defendant hereinafter next mentioned, to wit, on &c., at &c., one *Ann Prickett* was indebted to *Thomas Howell* and *John Howell*, before they became bankrupts, in the sum of 400*l.* and upwards, and had been, and was, then and there arrested for the said debt, at the suit of the said *Thomas Howell* and *John Howell*, and then and there remained in the custody of the sheriff of *Gloucestershire*, under and by virtue of the said arrest; whereupon, afterwards, and before the said *Thomas Howell* and *John Howell* became bankrupts, to wit, on &c., at &c., in consideration that the said *Thomas Howell* and *John Howell*, at the special instance and request of the defendant, would cause and procure the said *Ann Prickett* to be discharged out of the custody of the said sheriff, and take a bill of exchange, to be drawn upon and accepted by the said *Ann Prickett*, for the amount of the said debt and costs of the said suit, he, the defendant, undertook, and then and there faithfully promised the said *Thomas Howell* and *John Howell*, before they became bankrupts, to pay to them the amount of the said bill of exchange in case the same should be dishonoured by the said *Ann Prickett*, when he, the defendant, should be thereunto afterwards requested. The plaintiff, assignee as aforesaid, then averred that the said *Thomas Howell* and *John Howell*, before they became bankrupts, confiding in the said promise and undertaking of the defendant, did afterwards, to wit, on &c., at &c., cause and procure the said *Ann Prickett* to be discharged from the custody of the said sheriff, and did then and there take a certain bill of exchange, made and drawn by them upon, and accepted by, the said *Ann Prickett*, for the sum of 409*l.* 13*s.*, being the amount of the said debt and costs, payable one month after the date of the said bill, to the order of them, the said *Thomas Howell* and *John Howell;* and that, after the said bill became due and payable, to wit, on &c., at &c., the said bill was present-

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ed and shewn to the said *Ann Prickett*, for payment thereof, and she was then and there requested to pay the same; but that she wholly neglected and refused to pay the same or any part thereof, and wholly dishonoured the same; whereof the defendant, afterwards, to wit, on &c., at &c., had notice, and was then and there requested by the said *Thomas Howell* and *John Howell* to pay the same.

The *second* count stated,—That, afterwards, and before the time of the making of the promise of the defendant thereinafter mentioned, to wit, on &c., at &c., the said *Ann Prickett* was indebted to the said *Thomas Howell* and *John Howell*, before they became bankrupts, in a further sum of 400*l.* and upwards, and had been and was arrested for the said last-mentioned debt at the suit of the said *Thomas Howell* and *John Howell*, and remained in the custody of the sheriff of *Gloucestershire*, under and by virtue of the said last-mentioned arrest; whereupon, afterwards, and before the said *Thomas Howell* and *John Howell* became bankrupts, to wit, on &c., at &c., in consideration that the said *Thomas Howell* and *John Howell*, at the like special instance and request of the defendant, would cause and procure the said *Ann Prickett* to be discharged out of the custody of the said sheriff, he, the defendant, undertook and faithfully promised the said *Thomas Howell* and *John Howell*, before they became bankrupts, to pay to them the said last-mentioned debt, and the costs of the last-mentioned suit, when he, the defendant, should be thereunto afterwards requested. The plaintiff, as assignee, then averred that the said *Thomas Howell* and *John Howell*, confiding &c., did afterwards, to wit, on &c., at &c., cause and procure the said *Ann Prickett* to be discharged from the custody of the said sheriff; and that the last-mentioned debt and costs amounted to a large sum, to wit, 409*l.* 13*s.*, whereof the defendant, afterwards, to wit, on &c., at &c., had notice, and was then and there requested by them to pay the said last-mention-

ed sum of money. To these were added counts for goods sold and delivered to *Ann Prickett* by the *Howells*, before they became bankrupts, and on an account stated.

The defendant pleaded,—*First*, the general issue.—*Secondly*, "that the said *Thomas Howell* and *John Howell* the younger were not nor are bankrupts, as by the declaration is supposed."—*Thirdly*, "that the plaintiff was not nor is assignee of the estate and effects of the said *Thomas Howell* and *John Howell* the younger." On which issues were joined.—*Fourthly*, to the first and second counts, "that the several supposed promises and undertakings in those counts respectively mentioned, were special promises, and each of them was a special promise for the debt of another person, to wit, the said *Ann Prickett;* and that no agreement, in respect of, or relating to, the supposed causes of action in the first and second counts of the said declaration, or either of them, nor any memorandum or note thereof, wherein the consideration or considerations for the said special promises, or either of them, was or were stated or shewn, was or is in writing, or was or is signed by the said defendant, or by any other person by him thereunto lawfully authorized;" and *Lastly*, as to the said first and second counts, "that long before and at the time when the said *Ann Prickett* is supposed, in and by the said counts of the said declaration, to have become indebted to the said *Thomas Howell* and *John Howell*, and from thence continually until the making of the said supposed promises and undertakings in those counts respectively stated, the said *Ann Prickett* was the wife of one *William Prickett*, which said *William Prickett* at the time of the accrual of the said supposed debt to the said *Thomas Howell* and *John Howell*, and during all the time aforesaid, was the husband of the said *Ann Prickett*, and in full life, to wit, at &c."

The plaintiff demurred specially to the fourth and last pleas, assigning for causes, "that the last-mentioned pleas,

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in manner and form as the same are above pleaded, amount severally to the general issue, and tend to great and unnecessary prolixity of pleading; and also, that the defendant has not, by his pleas last mentioned, or either of them, traversed or denied, or attempted to put in issue, any matter of fact alleged by the plaintiff in his said first and second counts, but has, in each of those pleas respectively, introduced, and attempted to put in issue, matters of fact, not alleged nor necessary to be alleged: and also, that the fourth and last pleas are, in other respects, uncertain, informal, and insufficient, &c."

The defendant joined in demurrer.

The cause came on for argument in the course of the last Term.

Mr. Serjeant *Wilde*, in support of the demurrer.—The fourth plea contains no matter which would not be admissible in evidence under the general issue, nor does it present to the Court any matter of law, but of fact only. It also contains several distinct and perfect matters of defence; and consequently, if the plaintiff took issue in his replication on one of those matters, a good and available defence might still remain. The rule, that a plea which is bad in part, is bad for the whole, applies when several facts constitute one defence; and if one link fail, the plea fails altogether, as the plaintiff can only take issue on one fact. The plea in question states, *first*, that the promises were special promises for the debt of another person; *secondly*, that no agreement in respect of, or relating to, the supposed causes of action in the declaration, nor any memorandum or note thereof, wherein the consideration for the promises was stated or shewn, was in writing; and *lastly*, that it was not stated or shewn to be signed by the defendant, or by any other person by him thereunto lawfully authorized. The statute of frauds requires, that two things shall exist, *viz.* that the agreement

be in writing, and that it be signed by the party giving it; and the absence of either of them affords a perfect defence to an action founded on the agreement. The want of consideration will also render it void; for it is now laid down as a general principle of law, independently of the statute, that the consideration for the promise, as well as the promise itself, must appear upon the face of the agreement. If, therefore, the plaintiff, in his replication, had traversed the one allegation, *viz.* that the agreement was not in writing, he would have left the other unanswered, *viz.* that it was not signed by the defendant or his agent; and he could not traverse both.

[Mr. Justice *Gaselee.*—The whole of the 4th section of the statute, which applies to this question, must be taken together. It will then read thus: "No action shall be brought, whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." The plea is framed accordingly, and negatives the existence of those things which are required by the statute.]

The defendant might have pleaded, that the agreement was not stamped or sealed; and although the statute may require several things to be done, in order to make an agreement binding on the contracting party; still they cannot all be introduced into one plea, and the Court will not sanction intricate and special pleas, if justice can be obtained without them. The fourth plea contains allegations of several and distinct facts, all of which might have been proved under the general issue. The same objections apply more forcibly and distinctly to the fifth plea, which states, that long before *Ann Prickett* was indebted to the *Howells*, and until the making of the promise in

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the declaration, she was a married woman, and that her husband was alive; but she was not driven to plead her coverture, and her discharge from imprisonment at the suit of the *Howells*, was the sole consideration for the defendant's promise. In *Longridge* v. *Dorville* (a), the giving up a suit, instituted to try a question respecting which the law was doubtful, was held to be a good consideration for a promise to pay a stipulated sum:—there, a ship, having on board a pilot required by law, ran foul of another vessel, and proceedings were instituted in the *Admiralty* Court, by the owners of the latter, to compel the owners of the former to make good the damage; and the former vessel was detained until bail was given; and, pending such proceedings, the agents of the owners of the vessel detained, agreed, on the owners of the damaged vessel removing all claims on the other vessel, and on their proving the amount of the damage done, to indemnify them, and to pay a stipulated sum by way of damages; it was held, that, there being contradictory decisions, as to the point, whether ship owners were liable for an injury done while their ship was under the control of the pilot required by law, there was a sufficient consideration to sustain the promise made by the agents of the owners of the detained vessel, to pay the stipulated damages. There, it was insisted, that there was no sufficient consideration for the defendant's promise, because the plaintiffs had no ground for instituting the suit in the *Admiralty* Court, and that the forbearance of a suit, where a party is not liable, is not a good consideration; but Lord Chief Justice *Abbott* said, "I am of opinion, that there is a sufficient consideration to sustain the promise, without enquiring whether the owners of the ship are liable;" and, after stating the facts of the case, he observed: "The plain meaning of the defendant's engagement appears

(a) 5 Barn. & Ald. 117.

to be this—Release the ship, and we will waive all questions of law and fact, except the amount of damage; we will pay you a certain sum, if the damage done amounts to that sum. The plaintiffs, by not insisting upon the bail required, therefore, relinquished a benefit which they might have had, if the law had been with them. The law might fairly be considered as doubtful, for there had been contradictory decisions on the subject; and the parties agree to put an end to all doubts on the law and the fact, on the defendant's engaging to pay a stipulated sum." In that case, the defendants had procured to themselves an advantage, by having the suit put an end to without further investigation, and, having availed themselves of it, it was not competent to them afterwards to resort to the original cause of action. So here, *Ann Prickett*, being in custody at the suit of Messrs. *Howell*, the defendant, in consideration that they would procure her discharge, and take her acceptance for the amount of the debt and costs, promised to pay the bill, if it should be dishonoured by her; and he cannot now turn round and say, that she was not liable, she being a married woman at the time; nor can he dispute the validity of the original demand against her. The defendant's promise was not made in consideration of forbearance, or of credit to be given to *Ann Prickett*; but merely in consideration of her being discharged out of custody; and, on that event taking place, he was estopped from disputing her liability, as there was a sufficient consideration for the promise, independently of such liability. It was, in fact, an original promise, and, therefore, need not have been in writing; and it is not alleged in the declaration, that any credit was to be given or extended to *Ann Prickett*, but merely, that she was to be discharged out of custody. Such discharge, therefore, which was voluntary on the part of the *Howells*, was the foundation of the consideration for the defendant's promise; and if a person, for a consideration either moving to himself or from another, promise to pay a sum, or to do some other act, it is clearly

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an original undertaking; for in *Bayley* v. *Croft* (*a*), where, in order to facilitate the making of an agreement, for which there was sufficient consideration between the plaintiff and a third person, the defendant, who received no benefit to himself by the agreement, became party thereto—it was held, that, as the agreement was such as the plaintiff would not have made unless the defendant had acceded, there was a sufficient consideration for the defendant's promise. So, in this case, the consent by the *Howells* to discharge *Ann Prickett* out of custody formed a good consideration for the defendant's promise, which was to pay a bill not then in existence, as it was *to be drawn* in pursuance of that promise. It was not, therefore, requisite that such promise should have been in writing; and the fourth and last pleas are consequently nugatory, and ought not to have been pleaded.

Mr. Serjeant *Taddy, contra.*—The fonrth plea is drawn in precisely the same terms as that in *Saunders* v. *Wakefield* (*b*). There, the plaintiff replied, that the agreement was in writing, and signed by the defendant, and which was set out; and the defendant demurred generally to the replication; and it was contended on the part of the plaintiff, that the plea was bad; but the Court decided otherwise. Here, however, it has been said, that the plea is multifarious. That would be cause of special demurrer; but as it was not assigned, the objection cannot be now made. Besides, if it had been, it could not have availed; for the plea follows the terms of the statute, merely introducing, in addition thereto, an allegation of the absence of that which the law requires, *viz.* a memorandum or note in *writing*, stating the *consideration* for which the promise was made; and, in order to give a cause of action within the terms of the statute, the agreement must not only be in writing, but must also contain the consideration for the

(*a*) 4 Taunt. 611. (*b*) 4 Barn. & Ald. 596.

promise, as well as the promise itself. If the fourth plea can be deemed to amount to the general issue, it will be useless to plead specially in an action of *assumpsit;* but it is a well known and established rule, that, if a defence consist of matter of law, it may be pleaded specially, so as to be presented to the Court; and it is frequently extremely convenient to do so, as it tends to save the parties the expense of a trial. If there had been no note in writing by the defendant or his agent, it is quite clear that this action could not be maintained; and nearly all special pleas in *assumpsit* allege facts that may be given in evidence under the general issue. In *Hussey* v. *Jacob* (*a*), the Court said, "'tis not a rule, that, because such a matter may be given in evidence under the general issue; therefore it ought not to be pleaded specially; for it often happens to be in the election of the defendant, either to plead it specially, or not, as he should be advised; as, for instance, the pleading a release, coverture, or infancy, in an *assumpsit*, is certainly good; and yet those things might be given in evidence upon *non assumpsit* pleaded; however, the defendant sometimes may not be willing to put such matters of law to the judgment of the Jury, or perhaps may design to save the costs of a special verdict." In many cases, where a defence is founded on a statute, it must be pleaded specially. Thus, in debt on bond, the statute of usury cannot be given in evidence under the general issue, although that statute makes usurious contracts utterly void. So where the matter of a plea confesses the cause of action, but avoids it, the defendant may plead specially, though he might have given it in evidence on the general issue. The rule, as to pleas amounting to the general issue, and matters which may be pleaded or given in evidence, is laid down, and the earlier cases collected, in *Bacon's Abridgment* (*b*), where it is said, that, where the defence consists in matters of law, there, the defendant

(*a*) Carth. 357; *S. C.* 1 Salk. 344. (*b*) Tit. "Pleas and Pleading," G. 3.

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may plead specially; but where it is purely fact, the general issue must be pleaded. And in all actions the defendant may shew any matter to the Court, why the action does not lie; and this, being matter of law, is proper to be shewn to the Court, and not to the Jury, for, being questions of law, the Judges are to determine whether or not they discharge or bar the plaintiff's action. In *Pain* v. *Rochester* (*a*), the reason given that matter of law may be pleaded specially, though it may be given in evidence under the general issue, is "*pur doubt del lay gents*," that is, to avoid giving the Jury the trouble and danger of drawing legal inferences; and here, the defence is founded on the absence of a form required by statute. Although the Court might have refused leave to the defendant to plead the fourth and last pleas when the rule for pleading several matters was moved, yet, upon demurrer, the only question is, whether the pleas are good; and each of them must be treated as if it had been pleaded alone. The fifth or last plea states, that before and at the time when *Ann Prickett* is supposed by the declaration to have become indebted to *Howells*, the bankrupts, and from thence continually until the making of the defendant's promise, she was the wife of one *William Prickett*, who, at the time of the accrual of the debt to *Howells*, was her husband, and still alive. In *Hussey* v. *Jacob*, the Court said, that coverture might be pleaded in *assumpsit;* and such a defence frequently presents a question of law, as a feme covert may be considered as a feme sole, by the custom of *London;* or she may acquire a separate character, by the civil death of her husband, by exile, or transportation for life: Besides, here, the declaration does not state that *Ann Prickett* was sued with her husband, nor does it state any circumstance that could legally constitute a debt due to the *Howells* from *her*. It is only stated that she was arrested at their suit, and in custody; and that, in consideration that

(*a*) Cro. Eliz. 871.

they would discharge her from custody and take her acceptance, the defendant promised to pay them the amount of the bill, in case it should be dishonoured by her; and yet it has been said, that this does not amount to a promise to pay or be answerable for the debt of another. The words of the statute, are not confined to a debt, but extend to the default or miscarriage of another; and, if *Ann Prickett* dishonoured her acceptance, the defendant undertook to pay its amount. The case of *Longridge* v. *Dorville*, turned entirely on the effect of the validity or sufficiency of the consideration, and Mr. Justice *Holroyd* there said: "If a person is about to sue another for a debt, for which the latter is not answerable, the mere consideration of forbearance is not sufficient to render him liable for that debt. Any act of the plaintiff, however, from which the defendant derives a benefit or advantage, or any labour, detriment, or inconvenience, sustained by the plaintiff, is a sufficient consideration to support a promise. Now, the consideration of forbearance is a benefit to the defendant, if he be liable; but it is not any benefit to him, if he be not liable. Here, a suit actually commenced is given up, and a suit, too, the final success of which was involved in some doubt. The plaintiff might sustain a detriment by giving up all claim in respect of the expenses incurred, and the defendant might derive a benefit by having that suit put an end to without further trouble or investigation. Now, I am of opinion, that the giving up of a suit instituted for the purpose of trying a doubtful question, and consenting to deliver up the ship, which might otherwise have been detained until the security required was given, is a good consideration to support a promise to pay a stipulated sum, by way of damage, in case the actual damage amount to that sum. In *Com. Dig.* tit. '*Action on Case upon Assumpsit*' (F. 8), it is laid down, that an action does not lie, if a party promise, in consideration of a surrender of a lease at will; for the lessor might determine it, unless there

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was a doubt whether it was a lease at will, or for years; and 1 *Roll. 23 l, 25, 35,* and 1 *Brownlow,* 6, are cited. That is an authority to shew that the giving up of a questionable right is a sufficient consideration to support a promise. Here, therefore, the giving up of a suit, instituted to try a question respecting which the law is doubtful, is a good consideration to support a promise." All that the Court decided in that case was, that the giving up of a doubtful suit was a sufficient consideration for an original promise or undertaking; and here, the plaintiff, by demurring, has admitted the truth of the allegation contained in the plea, *viz.* a special promise by the defendant to pay the debt of another; and as the bill drawn by the *Howells* on *Ann Prickett* was accepted by her, the undertaking by the defendant was for her default alone, and, consequently, for a debt for which there was no legal liability, and which could not be enforced at the time of the promise. The pleas, therefore, only present matters of law, which were proper to come before the Court, and may be supported, although such matters might be given in evidence under the general issue.

Mr. Serjeant *Wilde,* in reply.—The object of the parties in *Saunders* v. *Wakefield* was to take the opinion of the Court, on the construction of a guarantie, given by the defendant, to pay a bill drawn by a third person in favour of the plaintiff, and the agreement or guarantie was set out in the replication, to which there was a general demurrer. But the terms of the plea were not adverted to. It must be admitted, that although many pleas may amount to the general issue, yet that they may be pleaded specially, as they may present matters of law, proper to be shewn to the Court, but here the pleas demurred to are not put on the record for the purpose of taking the judgment of the Court on any matter of law; for they only present matters of fact triable by a Jury, *viz.* the fourth, whether there

were any memorandum of the defendant's agreement in writing, and if there were, whether it were signed by him; and, therefore, the plea is bad on general demurrer. The last plea merely raises the question, whether *Ann Prickett* were a married woman at the time she became indebted to *Howells*, and entitled to be discharged out of custody at their suit, as she could not be liable as such; but that plea does not raise the question whether or not there was a sufficient consideration for an original promise by the defendant. To ascertain this, regard must be had to all the facts. *Ann Prickett* was in custody at the suit of the *Howells*, and, without any objection to the validity of their demand, the defendant required them to forego an advantage they had obtained, by having her in custody, and, in consequence of their consenting to forego that advantage, he undertook to pay the amount of the debt and costs, in case a bill of exchange, accepted by her for the amount, should be dishonoured. This was in the nature of an original promise, and, on the faith of it, she obtained her discharge.

Cur. adv. vult.

Mr. Justice PARK now delivered the judgment of the Court, and, after reading the declaration, proceeded as follows:—

To this declaration several pleas were pleaded, but I need only mention the *fourth* and *last*. [The learned Judge read them, and thus continued:]—To these there is a special demurrer, stating for cause, that the facts in these pleas alleged, only amounted to the general issue. [The learned Judge then read the demurrer.] I suppose it may be truly said, that, looking through all the law books, there is not a greater variety of opinions upon any question, than what pleas do or do not amount to the general issue; nor any one upon which there is a greater mass of contradictory decisions. I shall not, therefore,

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attempt, though I have looked at many of them, to go through, or endeavour to reconcile them. I satisfy myself, in general, with saying, that though, perhaps, the general issue might answer the purpose, it does not therefore necessarily follow that the demurrer, on that ground, must be allowed, nor that the defendant was bound to give the matters pleaded in evidence under the general issue.

There are many instances in which a defendant has the option of giving his defence in evidence, or of putting it on the record. And though the facts alleged in the defendant's fourth plea might have been given in evidence under the general issue, the question is, whether the same facts, stated on the record, do or do not constitute a good plea. One species of cases in which this may be done is, where the plaintiff's right of action (which is confessed) is avoided by matter *ex post facto*, as, by payment, which may be given in evidence under the general issue, or pleaded. The other case may be, where the plea does not deny the declaration, but answers it by matter of law. The fourth plea in this case consists not in denying the plaintiff's right of action; it is not a denial of the facts in the declaration; but it is matter of defence in law, arising out of the statute of frauds. I think the whole of the doctrine, as to what pleas shall amount to the general issue, has been fully and admirably explained by Mr. Justice *Bayley*, Mr. Justice *Holroyd*, and Mr. Justice *Littledale*, in the case of *Carr* v. *Hinchliff* (*a*), which was not quoted to us in the argument at the bar on either side.

In the present case, it is true, that, as it appears to us to be an action brought on a promise for the debt, default, or miscarriage of another, the proof must, *at the trial*, have been, that such promise was in *writing*; but still, on the face of the declaration, the promise was good; and though, on the general issue, the plaintiff must have proved the

(*a*) 4 Barn. & Cres. 547; *S. C.* 7 Dow. & Ryl. 42.

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writing, the defendant avoids that, by shewing, in pleading, that it was not in writing.

The same observations apply to the *fifth* plea—the coverture of *Ann Prickett*.

The question then is, taking the declaration and pleas together—Does this amount to an undertaking void by the statute of frauds? If *Ann Prickett* had been discharged out of custody, having been arrested, upon a primary and absolute undertaking that the defendant would pay the debt at all events, or accept a bill for the amount, we are all of opinion, that the discharge of *Ann Prickett* from imprisonment would have been a sufficient consideration for such a promise, and that the defendant would have been liable. But the undertaking is merely, that if the plaintiffs would discharge *Ann Prickett*, and would take *her* acceptance for the amount, he, the defendant (without indorsing or becoming in any way a party to the bill), would pay the same, *in case it should be dishonoured by the said Ann Prickett*. This, though a new promise by *Ann Prickett*, was still only *collateral* on the part of the defendant; and being, by the demurrer to the plea, admitted *not to be in writing*, the Court are of opinion that the defendant is not liable.

Judgment for the defendant (*a*).

(*a*) See *Lilley* v. *Hewitt*, 11 Price, 494.

BELL *v.* JACOBS.

Monday, Feb. 4*th.*

A person was arrested within the liberty of the *Tower* of *London*, by an officer of the sheriff of *Middlesex*, under a writ of *capias*, without a *non omittas* clause; and gave a bail-bond:—The Court refused to order it to be delivered up to be cancelled.

THE defendant was arrested on the 2nd *January* last, for 300*l.*, by an officer of the sheriff of *Middlesex*, at the suit of the plaintiff, upon and by virtue of a writ of *capias ad respondendum* issued out of this Court, returnable in eight days

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of *St. Hilary*, without a *non omittas* clause, and gave a bail-bond to the sheriff for his appearance at the return of the writ. The caption was made at the defendant's residence in *Union Street, Bishopsgate*, which is situate within the liberty and precinct of his Majesty's *Tower* of *London*.

On an affidavit of these facts, Mr. Serjeant *Jones*, on a former day in this Term, obtained a rule, calling on the plaintiff to shew cause why the bail-bond should not be delivered up to be cancelled, and why the plaintiff should not pay the defendant his costs of the arrest and bail-bond, and of the present application.

There was a second action brought against the defendant, at the suit of the plaintiff, for 700*l*., in which Mr. Serjeant *Storks* had obtained a like rule on the same grounds.

For the defendant, two objections were raised:—*First*, that the arrest was bad, having been made within the liberty and precinct of the *Tower* of *London*, by the sheriff of *Middlesex*, without leave having been obtained from the Governor of the *Tower*; and, *secondly*, that the writ was irregular, in not having a *non omittas* clause, which is usually introduced for the purpose of giving the sheriff power to enter a liberty. In support of the first objection, the case of *Winter* v. *Miles* (*a*), was relied on, where it was decided, that civil process cannot be executed in any of the King's palaces, which are kept prepared for his Majesty's reception, although he may not reside therein; and in *Batson* v. *M'Lean* (*b*), it was held, that an arrest within the *Tower* is bad; and here it was contended, that the privileges of the *Tower* had been infringed on, as the Constable of the *Tower* was the proper officer to execute the process; and that, as it appeared that the sheriff's officer did not even apply to him for leave to arrest the defendant, he was entitled to his discharge.

(*a*) 10 East, 578. (*b*) 2 Chit. Rep. 48, 51.

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Mr. Serjeant *Wilde* now shewed cause, and having premised that this case was distinguishable from *Batson* v. *M'Lean*, as there Lord *Ellenborough* only observed, that if an arrest appeared to have been made *within* the *Tower*, it would be bad; whilst here, the defendant was arrested merely *within the liberty or precinct*, and, therefore, could not claim an exemption arising from the privileges of the *Tower* itself; and, even if he could, he had waived the objection, by having since put in and perfected bail. The learned Serjeant was proceeding with his argument, when the Court called on—

Mr. Serjeant *Jones* and Mr. Serjeant *Storks* to support their rules.—The defendant justified bail since the rules were obtained, so that the last objection cannot apply. In *Batson* v. *M'Lean*, the defendant was Major of the *Tower*, and had been to *Carlton House*, to the Prince Regent, on official business, and, as he was returning, was arrested, when he got out of his carriage, within the *liberties* of the *Tower*, and he claimed a personal, as well as an official exemption, and also an exemption arising from the privileges of the place; and Lord *Ellenborough* expressly said (*a*), that, if the arrest had been within the *Tower*, there could be no doubt but that it would have been wrong; and here it is sworn that the defendant was arrested within its liberty and precinct. In *Winter* v. *Miles* (*b*), it was decided, that process cannot be lawfully executed in *Kensington Palace*. Every place devoted to the service of the Crown, is entitled to the privileges of a royal residence; and the *Tower* is clearly within the jurisdiction of the Crown. A governor, lieutenant-governor, constable, and other officers, are appointed by the Crown; and the King exercises a state authority there. So, the precincts are set apart for the purposes of the state; and the true distinction is be-

(*a*) 2 Chit. 53. (*b*) 1 Camp. 475, n.

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tween franchises which belong to a subject, who may have a private and immediate remedy for any invasion, as far as such franchise legally extends, and palaces or places over which the Crown exercises a clear and distinct prerogative. The ruling of Lord *Ellenborough* in *Winter* v. *Miles* was afterwards confirmed by the Court in *Banc* (*a*); and in *Elderton's* case (*b*), it was held, that a person cannot be arrested within the verge of a royal palace; and the *Tower* is equally privileged as one of such palaces; at all events, it is a liberty and county of itself, as, by the 37th *Geo.* 3, c. 25 (an act for the better raising and ordering the militia forces of the *Tower* hamlets), the clerk of the peace of the *Tower* is, by the 11th section, required to enter the qualifications of the officers on a roll; and the 13th section enacts, that all indictments and prosecutions for any offence committed within any part of the *Tower* hamlets, relating to the militia-laws, or to any offence committed against the act, shall be preferred before, and heard and determined by, the Justices assembled at some general quarter sessions of the peace to be holden for the liberties of the *Tower*, which Justices are thereby empowered to hear and determine the same. The 15th section provides, that any Justice of the Peace for the liberties may act in the execution of the act, notwithstanding he may be a deputy lieutenant of the hamlets, or officer in the militia. And by the 43 *Geo.* 3, c. 55, s. 13, the constable of the *Tower* of *London*, lieutenants of the *Tower* hamlets, and the deputy-lieutenants of the hamlets, and their several officers, the Justices of the Peace for the *Tower* liberties, the constables, and other peace officers within the same, &c. &c., were to put in execution all and every the powers and provisions contained in that act, in like manner as they were authorized to put in execution the several laws respecting the militia forces of the kingdom.

(*a*) 10 East, 578. (*b*) 2 Ld. Raym. 978; *S. C.* 3 Salk. 91.

Mr. Justice PARK.—I am of opinion, that there is no colour for this objection, but as it was stated, when the application was made, that it embraced a question touching the rights and privileges of the *Tower* of *London*, we thought it right to grant a rule to shew cause. I have since looked fully into all the cases, and think there is no foundation for cancelling the bail-bond given by the defendant. If the prerogative of any of the officers of the *Tower* has been improperly invaded, the person who ought to have executed the process might have some ground to apply to the Court, but not the defendant. In *Fitzpatrick* v. *Kelly* (*a*), the defendant was arrested on a peace warrant at the *Salopian* Coffee House, within that part of the verge declared to be part of the Palace, by the statute of *Hen.* 8, and carried before a Justice, by whom he was discharged, and, on his return, was arrested in a civil action, at the suit of the plaintiff; it was contended, that this arrest being made under colour of the peace warrant, to elude the franchise, was void; as to which Lord *Mansfield* said, that, as it appeared to have been a contrivance, it was the same as if the defendant had been arrested within the verge of the Court. But such arrest was not void. The person making the arrest was liable to answer to the person possessed of the franchise which had been violated, but the person arrested was entitled to no action. In The *King* v. *Stobbs* (*b*), the defendant was indicted for assaulting and imprisoning *E. Pyott*, Esq. within the King's Palace at *Westminster*, and the Court held that the indictment would not lie against an officer of the *Palace* Court for arresting, within the King's Palace, a person not of the King's household, against whom a writ had issued out of that Court, though no leave to make the arrest had been obtain-

(*a*) M. T. 22 Geo. 3, K. B. 3 Term Rep. 740, n.

(*b*) 3 Term Rep. 735

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ed from the Board of Green Cloth. The case of The *King* v. *Ferguson* (*a*), was there referred to, in the course of the argument, and distinguished from The *King* v. *Stobbs*, by Lord *Kenyon*, in delivering his judgment in that case. In *Winter* v. *Miles*, it appeared that *Kensington Palace* was kept in a constant state of preparation to receive the King, and that he had servants and state rooms in it, and that the Duke of *Sussex* actually occupied apartments there: and although in *Batson* v. *M'Lean*, Lord *Ellenborough* is reported to have said, that an arrest *within* the *Tower* would have been wrong, yet it would be too much for us to say, that a person arrested within its liberty or precinct, should be discharged on motion.

Mr. Justice BURROUGH.—The case of *Fitzpatrick* v. *Kelly*, appears to me to have been rightly decided, and although the officer making the arrest might be liable to answer to the person possessed of a franchise within the *Tower*, if it have been violated, yet the party arrested cannot maintain an action.

Mr. Justice GASELEE.—In *Tidd's Practice* (*b*), it is said, "an arrest within the *Tower* of *London* would, it seems, be bad, without leave obtained from the Governor;" but in *Sparks* v. *Spink* (*c*), it was held, that an arrest within the verge of the Palace is no ground for discharging the party arrested out of custody, on the ground, that, if those who have jurisdiction are injured, it is for them alone to complain. I very much doubt, whether the hamlets, or liberties of the *Tower* can be considered as part of the *Tower*, for, in the Fourth Institute (*d*), Lord *Coke*, in treating of the court of the *Tower*, observed, that where it is said that the *Tower*

(*a*) 10 Geo. 3.
(*b*) 8th Ed. 217.
(*c*) 7 Taunt. 311.
(*d*) 251.

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of *London* is within the city of *London*, it is thus to be understood, that the ancient wall of *London* extends through the *Tower*, and all that which is environed with the wall, *viz.* on the west part thereof, is within the city of *London*, and the residue of the *Tower*, on the east part of that ancient wall, is within the county of *Middlesex*; and this was found out in the case of Sir *Thomas Overbury*, who was poisoned in a chamber in the *Tower*, on the west part of that old wall. If, however, the privileges of the *Tower* have been invaded, let the officer, whoever he may be, make his complaint. This case is altogether distinguishable from *Winter* v. *Miles*, as there the King had state apartments in the palace, and one of his sons actually resided there.

Rule discharged with costs.

COSTELLO *v.* CAWLEY.

Tuesday, Feb. 5th.

The defendant was arrested in the *Palace* Court, for 19*l.*, and removed the cause by *Habeas* to this Court. The plaintiff recovered 2*l.* On motion by the defendant for his costs, under the statute 43 *Geo.* 3, c. 46, s. 3:—The Court held, that, the action having been *brought* in the *Palace* Court, they could not interfere.

THIS was an action for work and labour done for the defendant by the plaintiff, a painter. At the trial, before Lord Chief Justice *Best*, at *Westminster*, at the Sittings after the last *Trinity* Term, it appeared that the defendant had been arrested for 19*l.*; that the plaintiff had agreed to paint the defendant's house for 12*l.*; and that the defendant had paid him 10*l.*, but refused to pay him the full amount, as he alleged that the work had been improperly done. Under these circumstances, the Jury found a verdict for the plaintiff for the remaining 2*l.*

Mr. Serjeant *Adams*, in the last Term, obtained a rule *nisi*, that the defendant might be allowed his costs of the action, to be taxed by the Prothonotary, he having been

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arrested for 19*l.*, 2*l.* only being actually due to the plaintiff, and for which the verdict was found.

Mr. Serjeant ***Wilde*** now shewed cause, on an affidavit which stated that the action was commenced in the *Palace* Court, and removed by the defendant to this Court by ***habeas;*** and he submitted that the statute 43 *Geo.* 3, c. 46, s. 3 (*a*), on which the application was founded, only entitled a defendant to costs of suit, to be taxed according to the custom of the Court ***in which the action should have been brought***, and consequently that this Court had no power to interfere.

Mr. Serjeant *Adams*, in support of his rule, insisted that, as this was a remedial statute, it should receive a *liberal* construction; that the *Palace* Court had an unlimited jurisdiction as to the amount recoverable in it; that, when a cause is removed or ***brought*** from thence to this Court, it must be considered as *commenced* here for the purposes of this act; and that it would be extremely hard on a defendant, if he should be excluded the benefit

(*a*) By which it is enacted, that, "in all actions to be brought in *England* or *Ireland*, wherein the defendant or defendants shall be arrested and held to special bail, and wherein the plaintiff or plaintiffs shall not recover the amount of the sum for which the defendant or defendants in such actions shall have been so arrested and held to special bail, such defendant or defendants shall be entitled to costs of suit, to be taxed according to the custom of the Court in which such action shall have been ***brought;*** provided that it shall be made appear, to the satisfaction of the Court in which such action is ***brought***, upon motion to be made in Court for that purpose, and upon hearing the parties by affidavit, that the plaintiff or plaintiffs in such action had not any reasonable or probable cause for causing the defendant or defendants to be arrested and held to special bail in such amount as aforesaid, and provided such Court shall thereupon, by a rule or order of the same Court, direct that such costs shall be allowed to the defendant or defendants."

of it, although he would have been clearly entitled to it in the Court below.

But by the Court—The objection is well founded, the terms of the statute being imperative as to the costs being taxed according to the custom of the Court in which the action is *brought*. The statute applies to every Court in the United Kingdom, as the 1st section enacts, that no person shall be arrested on any process issuing out of *any* Court in *England* or *Ireland*, for a cause of action not originally amounting to such sum for which such person is now by law liable to be arrested, exclusive of costs. If the defendant had not removed the cause, the costs in the Court below would have been infinitely less; and he has his remedy by bringing an action for a malicious arrest, if he may think proper so to do. At all events, we have no power to interfere on motion.

Rule discharged.

DOE on the several demises of STEVENS and DUMÉE *v.* SCOTT.

Tuesday, Feb. 5th.

THIS was an action of ejectment, to recover possession of four messuages, four workshops, four outhouses, four yards, and four gardens, with the appurtenances, situate in the parish of *St. John, Clerkenwell*, in the county of *Middlesex*. The declaration alleged two demises, the first by *Stevens*, a trustee under the will of one *Mary Wilcox*, the mother of the defendant's wife, and the second by *Dumée*, her heir at law.

At the trial, before Mr. Justice *Gaselee*, at *Westminster*,

A testatrix devised lands to *C. S.*, and his heirs, in trust, to and for the sole and separate use of her daughter, *S. S.*, and to convey, assign, and assure the same to *S. S.*, her heirs and assigns, for ever, free from and independent of the debts &c., of any present or any future husband, and to *empower and permit* her to take and receive the rents &c., and to give receipts for the same, *or to appoint* any person to receive them, as if she were sole and unmarried. *S. S.* afterwards made a will, whereby she devised the lands to her husband, for life, with remainder over, and died:—Held, that the legal estate vested in the trustee during her life, and that the devise by *S. S.*, during her coverture, was void.

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at the Sittings in the last Term, it appeared that *Mary Wilcox*, by her will, bearing date the 25th *August*, 1813, executed and attested as by law required to pass real estates, gave and devised (*inter alia*) as follows:—"I give and devise unto *Charles Stevens* (one of the lessors of the plaintiff) and his heirs, all that my freehold messuage or tenement, dwelling-house, and premises, with the workshops, back-buildings, and appurtenances, situate in *Aylesbury Street, Clerkenwell*, now on lease to, and in the possession of, Mr. *Scott* (the defendant), and all that my freehold messuage or tenement, with the appurtenances, situate and being in *Gray's Inn Lane*, in the parish of *St. Andrew, Holborn*, known by the sign of the *Black Dog* and *Punch Bowl*, in the possession of Mr. *Meux*, or his undertenants, *In Trust* to and for the sole and separate use of my daughter, *Sarah Scott* (the defendant's wife), and to convey, assign, and assure the said last-mentioned freehold messuage, tenement, workshops, hereditaments, and premises, unto her, the said *Sarah Scott*, her heirs and assigns, for ever, free from, and independent of, the debts, control, power, or engagements, of any present, or any future husband, and to empower and permit her to take and receive the rents, issues, and profits, of the said last-mentioned premises, and to give receipts and discharges for the same, from time to time, or to appoint any person to receive the same, as if she was sole and unmarried."

The testatrix, by a codicil to her will, appointed her son *Ellis James Dumée* (the other lessor of the plaintiff), and her daughter, *Sarah Scott* (the wife of the defendant), her executor and executrix, who proved the will accordingly.

The testatrix died on the 4th *July*, 1818, leaving her daughter, *Sarah Scott*, her surviving. On the 18th of *August*, 1820, *Sarah Scott* died, leaving her husband (the defendant) in possession of the premises in *Aylesbury Street*, and (never having had issue by her said husband)

leaving her brother and co-executor, the said *Ellis James Dumée*, her heir at law, whose claim, as such, was resisted by the defendant by virtue of a will, made by his wife dated the 7th *February*, 1820, whereby she devised to him (the husband), for life, the premises for which this ejectment was brought; and also the public house in *Gray's Inn Lane;* with remainder over to her nephew and niece in fee; and she appointed her husband sole executor. Under these circumstances, the learned Judge was of opinion that no legal estate vested in the defendant under his wife's will, and that, although, in some cases, a married woman, who had property settled to her separate use, might deal with it as a *feme sole*, still she could only be so deemed in a Court of Equity, which is empowered to direct a trust deed.

The Jury found a verdict for the lessors of the plaintiff; leave being reserved to the defendant to move to set it aside and enter a nonsuit, in case the Court should be of opinion that under the will of his wife, the legal estate was vested in him.

Mr. Serjeant *Jones*, in the last Term, accordingly obtained a rule *nisi*, and submitted, in the *first* place, that the verdict could not be supported upon both the demises; it must, at all events, be confined either to the trustee or to the heir at law, and the estate, if any, is at present vested in the former. *Secondly*, that although, regularly, a woman under coverture cannot make a will either of lands or goods, yet, in Equity, effect is frequently given to the testamentary dispositions of a wife. So she may make a will in execution of a power; and here, as the testatrix, *Mary Wilcox*, devised the premises sought to be recovered by this action to *Stevens*, and his heirs, in trust for the sole and separate use of her daughter, it falls within the statute of uses; and a devise to a trustee, to permit the devisee to receive the rents and profits, vests the legal estate absolute-

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ly in the latter, as being the person beneficially interested. In *South* v. *Alleine* (*a*), a testator gave all the rents of certain lands to a married woman, during her life, to be paid by the executors into her own hands without the intermeddling of her husband, and the Court held that it was a devise of the lands to her; and although in *Harton* v. *Harton* (*b*), a devise to trustees, and their heirs, upon trust, to permit a *feme covert* to receive the rents during her life, for her sole use, and after her decease to the use of her children, was held to vest the legal estate in the trustees; yet in *Sugden* on *Powers* (*c*), it is said, "a gift simply to the separate use of a *feme covert* is tantamount to a gift to such uses as she shall appoint by deed or will, although Lord *Rosslyn*, in one case (*d*), considered that an absolute power to appoint was essential where the trust was to pay from time to time. This, however, proceeded from the particular circumstances of the case, and his disinclination to support alienations by married women of their separate property; his decisions, latterly, on this point, were in direct opposition to the doctrine laid down by Lord *Hardwicke*, and Lord *Thurlow*, and have been since frequently shaken by Lord *Eldon* (*e*); and in a late case (*f*), Sir *William Grant* made a decision directly contrary to that in the case before Lord *Rosslyn*." According to these decisions, Mrs. *Scott* might in Equity be deemed a *feme sole*, and, if so, had a power to devise the premises in question to her husband, the defendant.

Mr. Serjeant *Taddy* now shewed cause—*First*, the testatrix, *Sarah Scott*, had no estate which a Court of law can regard: she had a mere equitable interest, and if so, the

(*a*) 1 Salk. 228; *S. C.* 5 Mod. 98, 101.
(*b*) 7 Term Rep. 652.
(*c*) 3d Edit. 115.
(*d*) *Mores* v. *Huish*, 5 Ves. 692.
(*e*) *Sperling* v. *Rockfort*, 8 Ves. 164; *Parkes* v. *White*, 11 Ves. 209.
(*f*) *Esser* v. *Atkins*, 14 Ves. 542.

statute of uses does not apply; *Secondly*, even if she had a legal estate in the property in question, she had no disposing power, she being a *feme covert*, and under the control of her husband, who survived her. The devise by Mrs. *Wilcox* to *Stevens*, the trustee, his heirs, and assigns, for the sole and separate use of Mrs. *Scott*, did not convey or create a power in her to make a will during coverture; for it is now settled, beyond the possibility of contradiction, that, when the Court can collect that the intention of a devisor is, that the estate or interest of a *feme covert* should be protected from the power and control of her husband, they will so construe the devise as to give her an equitable estate. This was decided in the case of *Jones* v. Lord *Say & Seale* (*a*), where lands were devised to trustees and their heirs, in trust to pay several legacies and annuities, and then to pay the surplus rents into the proper hands of a married woman, and, after her decease, that the trustees should stand seised to the use of the heirs of her body; —it was decreed, that this was a use executed in the trustees during the life of the *feme covert*, but that, after her decease, the legal estate vested in the heirs of her body. That case was referred to, and its principle adopted and confirmed, by Lord *Kenyon* and Mr. Justice *Lawrence* in *Harton* v. *Harton*, which is similar to the present, and its authority has never been questioned; it was there held, that a devise of lands to trustees, and their heirs, upon trust, to permit a *feme covert* to receive and take the rents and profits during her life, for her sole and separate use, and, after her decease, to the use of the first and other sons of her body, then to the daughters, as tenants in common, with other like limitations to other *femes covert*, vested the legal estate in the trustees. So, here, the devise was to *Stevens* and his heirs, in trust, for the sole and se-

(*a*) 1 Eq. Cas. Abr. 383; *S. C.* pl. 19; 3 Bro. Parl. Cas. 113. Vin. Abr. tit. "Devise," (C. b.)

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parate use of *Sarah Scott*, and to convey, assign, and assure, the premises to her, the said *Sarah Scott*, her heirs, and assigns, for ever, free from, and independent of, the debts &c. of her husband, and to empower and permit her to take and receive the rents, issues, and profits, and to give receipts, &c., as if she were sole and unmarried. Although in *South* v. *Alleine*, it was held, that a devise of the rents and profits to a married woman, during her life, to be paid by the executors, without the intermeddling of the husband, was a devise of the lands to her; yet that was merely the opinion of two Judges against that of Lord Chief Justice *Holt*, who thought the executors were trustees for the wife; and his opinion is now fully established by *Jones* v. Lord *Say & Seale*, which Lord *Kenyon*, in *Harton* v. *Harton*, said, it was a case by itself, that the best report of it was in *Viner's Abridgment* (*a*), and that it was recognized to be law by Lord *Hardwicke*, in *Bagshaw* v. *Spencer* (*b*). Here, it was only necessary to protect Mrs. *Scott's* life-interest, as, after her death, the legal estate vested in her heir at law; and by the statute of wills (*c*), a person can only devise the estate or lands he is actually possessed of; and, if he has not the legal estate, a Court of law will not interfere or sanction the devise. In *Peacock* v. *Monk*(*d*), where a Mrs. *Lestock*, having purchased a real estate in a house in the lifetime of her husband, and devised it in his life, the question was, whether it could pass thereby, she being a *feme covert* at the time of making her will, and of her death; and Lord *Hardwicke* there drew a distinction between real and personal estate; and said, "agreements for settling estates to the separate use of the wife on marriage are very frequent, relating both to real and personal estate. As to personal, undoubtedly, where there is an agreement between husband and wife, before marriage, that the wife,

(*a*) Vol. 8, 262.
(*b*) 1 Ves. 144.
(*c*) 32 Hen. 8, c. 1.
(*d*) 2 Ves. 190.

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shall have to her separate use either the whole or particular parts, she may dispose of it by an act in her life, or will; she may do it by either, though nothing is said of the manner of disposing of it: but there is a much stronger ground in that case, than can be in the case of real estate, because that is to take effect during the life of the husband; for, if the husband survives, he is entitled to the whole, and none can come into a share with the husband on the statute of distribution. Then, such an agreement binds and bars the husband, and, consequently, bars every body. But it is very different as to real estate: for her real estate will descend to her heir at law, and that more or less beneficially; for the husband may be tenant by curtesy, if they have issue; otherwise not: but still it descends to her heir at law:" and, by a note to that case (*a*), it appears that a case was cited at the bar, where a real estate of a wife was, by settlement before marriage, secured to her separate use, and as if she were a feme sole, but no power was given her to devise it, and she made a will—Lord Chief *Justice Willes*, having consulted the other Judges, determined that the will was void; and the estate was claimed by the heir at law, on the ground that a woman who has a real estate to her separate use, cannot be, in equity, considered as the absolute owner of it. Here, no power of appointment was given to *Sarah Scott* by the will of her mother, and no conveyance was made to her by the trustee; the legal estate therefore remains in him, until a conveyance be made to the heir at law. The cases referred to by Mr. *Sugden*, in his *Treatise on Powers*, in support of the position, that, where a married woman has property settled to her separate use without any restraint, she is, in equity, deemed a *feme sole*, and may dispose of it accordingly, and that a gift to her separate use is tantamount to a gift to such uses as she shall by deed or will appoint, re-

(*a*) 2 Vez. 192.

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late to personal property only, with the exception of that of *Burnaby* v. *Griffin* (*a*), where the question was as to the validity of an equitable recovery, the tenant to the *præcipe* being made by a married woman, which Lord *Rosslyn* held to be good. That, however, is altogether distinguishable from a devise or will. In *Fettiplace* v. *Gorges* (*b*), the bequest was of "all the *personal* estate of the testatrix." In *Parkes* v. *White* (*c*), the estate was settled to the *separate* use of a *feme covert*, and she had an express power of appointment. In *Rich* v. *Cockell* (*d*), the gift or bequest was of personal property, *viz.* money in the funds. So, in *Wagstaff* v. *Smith* (*e*), and in *Sperling* v. *Rochfort* (*f*), a doubt was raised, whether a Court of equity had jurisdiction to permit a married woman to give up her interest *for life* in a trust fund not settled to her separate use, nor subject to her appointment; and the Court, under these circumstances, refused to assist the husband. In *Essex* v. *Atkins* (*g*), a grant of an annuity by a married woman out of her separate *personal* property was established, it being a deliberate act, and she a free agent, and aware of what she was doing. As, therefore, *Sarah Scott* had only an equitable estate, and no power to devise, a will made by her during coverture is altogether void, or, at all events, could have no operation, unless the estate had been previously conveyed to her; and as no conveyance was made, the legal estate still vested in *Stevens*, the trustee; and although it may be contended, that he and his heirs were to hold the premises, in trust, for her sole and separate use, and to convey the same to her and her heirs, and with liberty for her to receive and take the rents, and give receipts for the same, or appoint any person to receive the same for her,

(*a*) 3 Ves. 66.
(*b*) 1 Ves. 46.
(*c*) 11 Ves. 209.
(*d*) 9 Ves. 369.
(*e*) Id. 520.
(*f*) 8 Ves. 164.
(*g*) 14 Ves. 542.

as if she were sole and unmarried, yet there is no power of direction, limitation, or appointment, by deed or will, or any other writing in the nature of a will, by which she might limit and appoint the same.

Mr. Serjeant *Jones*, in support of his rule.—*Sarah Scott* had not only a legal estate in the premises devised to her, but a power to devise in fee. It was evidently the intention of the testatrix, *Mary Wilcox*, to give her a fee simple in the premises. The sole object of appointing a trustee was, to prevent the intervention of marital rights. It must be admitted, that, if *Sarah Scott* had been a *feme sole*, she would have had a legal estate in fee simple, by virtue of which she might have devised in fee. Although, generally speaking, a *feme covert* cannot make a will, yet here there was a limitation to a trustee for the separate use of *Sarah Scott*, to convey and assure the premises to her, in fee, in her lifetime, and to permit her to receive the rents and profits, or to appoint any person to receive the same, as if she were sole and unmarried. This, therefore, was equivalent to a power to her to devise the remainder in fee, and if so, the devise to her husband for life, with remainder to her nephew and niece, is good. The question, then, is, whether her coverture destroyed her power of devising. Although, in *Harton* v. *Harton*, the Court held that the legal estate was vested in the trustees, yet that case does not apply, as there there was no devise to the wife in fee, but merely that she might receive the rents *during her life*, and, after her decease, to the use of the issue of her body, with remainder to the devisor's own right heirs, in fee. And Lord *Kenyon* there said: "This provision, it appears, was made in order to secure to several *femes coverts* a separate allowance, free from the control of their husbands; to effectuate which, it is essentially necessary that the trustees should take the estate with the use executed, otherwise the husband of each taker would be en-

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titled to receive the profits, and so defeat the very object which the devisor had in view." And on that *dictum* being cited in argument in *Doe* d. *Leicester* v. *Biggs* (*a*), Sir *James Mansfield* said, "he had always understood that decision to have gone on the ground that it was the case of a *feme covert*, and was so held in order to protect her." But here the trustee was empowered by the devise of *Mary Wilcox*, to *convey*, assign, and assure the premises to *Sarah Scott*, her heirs and assigns, in fee, in her life-time; it therefore was clearly the intention of the former, that she should have the whole estate in fee, and if so, a power in her to devise must be presumed, in order to satisfy the intent of the devisor, or, in other terms, although she did not take a legal estate for life, yet a power in her to devise or dispose of the remainder must be implied. In *Doe* d. *Player* v. *Nicholls* (*b*), a testator devised to trustees, in trust for his only son, all his freehold and copyhold lands, *to be transferred* to him as soon as he should attain the age of twenty-one; and in case he should die before he attained that age, then to *A. B.*, his heirs and assigns: it was held, that the trustees took, in the copyhold lands, an estate for years, determinable on the son's attaining the age of twenty-one, or by his death before that period: and Mr. Justice *Bayley* there said (*c*), "It may be laid down as a general rule, that, where an estate is devised to trustees for particular purposes, the legal estate is vested in them as long as the execution of the trust requires it, and no longer; and, therefore, as soon as the trusts are satisfied, it will vest in the person beneficially entitled to it." So here, the testatrix, *Mary Wilcox*, intended that the trustee should have a control over her daughter's life-estate, but as she was to have the whole beneficial interest as to the remainder, her coverture applied only to her life estate; and even if the fee had vested

(*a*) 2 Taunt. 111. (*b*) 1 Barn & Cres. 336. (*c*) Ib. 342.

in the trustee, the legal estate would only remain in him until he had conveyed it to the devisee according to the terms of the will; which might have been done at any time during the life of the latter. It is quite clear that the defendant may obtain relief in a Court of equity, and although it has been said, that the cases cited by Mr. *Sugden* in support of the position, that a married woman having property settled to her separate use is deemed a *feme sole*, and may dispose of it accordingly, apply to personal property only; yet the same principle is equally applicable to real: and a gift or devise to the separate use of a *feme covert* is tantamount to a gift to such uses as she shall appoint by deed or will. That is a clear and established rule of equity; but here the main, if not only difficulty, is, whether the Court can presume a power. No precise words are necessary to create it, and, on the principle that a Court of law will always endeavour to carry into effect the general intent of a testator, a power must here be presumed for *Sarah Scott* to devise the premises conveyed to her, in fee, by the will of *Mary Wilcox*. At all events, the verdict is too general as it now stands, and the plaintiff must elect on which demise it is to be entered up.

Mr. Justice PARK.—This case appears to me to lie in a very narrow compass. It has been admitted throughout the whole of the argument for the defendant, that he may obtain redress through the medium of a Court of equity, and there can be no doubt but that it is a case entirely for that Court to decide. It has not been denied that *Sarah Scott* was married at the time she made her will. The legal estate was not vested in her by the will of *Mary Wilcox*, but in a trustee, during her life; and yet she devised it to her husband who survived her. The object of the testatrix, *Mary Wilcox*, was to secure to her daughter the rents and profits of the premises during her life, and, after

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her death, to have them conveyed to her heirs. There is no power reserved by the will of the former, and it is quite clear that we cannot presume a power; for were we to do so, we should be going much further than any previous decision would warrant. The case of *Jones* v. Lord *Say & Seale*, appears to me to be in point, and it has ever been considered as an authority. There, the devisor devised estates to trustees and their heirs, upon trust, to pay debts and legacies, and to pay the residue to the proper hands of her daughter (a married woman), or to such person or persons as she should direct and appoint, for and during her life; and, from and after her decease, to the trustees, to stand and be seised of the premises to the use of the heirs of the body of her said daughter, severally and successively, and to the heirs of their several and respective bodies, in tail general; and it was decreed, that this was a use executed in the trustees during the life of the married woman. So here, *Sarah Scott*, a *feme covert*, was to receive the rents for her life, through the permission of the lessor of the plaintiff, *Stevens*, as trustee; and if she had survived her husband, perhaps the trustee would have been bound to convey the estate to her, according to the terms of the will; but, as she died previously, that question does not arise. If, indeed, she had outlived her husband, the trustee would have been still seised of the estate to the use of the devisee, *Sarah Scott*, free from, and independent of, the debts of any *future* husband she might have. As to whether the estate is now vested in the trustee, or the heir at law of *Sarah Scott*, appears to me to be immaterial, as far as it regards the present question. The devise was to the trustee, and his heirs, in trust for the devisee, and her heirs, and, on her death, the legal estate would, of course, have vested in her heir, according to the terms of the will. But, on the principle, that we cannot presume a power for *Sarah Scott* to

devise, and as the legal estate was vested in her trustee during her life-time, the devise by her to her husband was altogether void.

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Mr. Justice BURROUGH.—The words in the will of *Mary Wilcox* conveyed the legal estate to the trustee, and we cannot presume, or imply, a power for the devisee to devise or appoint, during her life-time; for if we were to do so, the intent of the original devisor would be defeated. She intended that her daughter, *Sarah Scott*, should be protected, at all events, during her life, from the debts or engagements of her then or any future husband. I am, therefore, of opinion, that the verdict found for the lessor of the plaintiff was right.

Mr. Justice GASELEE.—I entertained no doubt in this case at the trial; but as it was said that there were several authorities in point for the defendant, I reserved the question for the consideration of the Court; and I still continue of the same opinion. The legal estate, under the will of *Mary Wilcox*, vested in *Charles Stevens*, the trustee, during the life of *Sarah Scott;* and if the defendant cause proceedings to be instituted in a Court of equity, the trustee and heir at law must be made parties. We are not, however, bound to confine the verdict to one demise; perhaps, therefore, it might be better to have it entered up on the second, as the legal estate, after the death of *Sarah Scott*, was vested in her brother, the second lessor, as her heir at law.

Rule discharged.

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Wednesday, Feb. 6th.

DOE on the several demises of LAWRIE and GLASS *v.* DYBALL.

[H. T. 6 & 7 *G.* 4. Roll 358.]

In ejectment, the plaintiff declared for twenty messuages, *twenty tenements*, &c. and, after verdict, and a writ of error brought in the *King's Bench*, this Court allowed the record to be amended, by striking out the words "twenty tenements."

THIS was an action of ejectment.—The premises were described in the declaration as "twenty messuages, *twenty tenements*, twenty yards, twenty outhouses, and one acre of land, with the appurtenances, in the parish of *St. Luke*, in the county of *Middlesex*."—The defendant pleaded the general issue.

At the trial, before Lord Chief Justice *Best*, at *Westminster*, at the Sittings in *Easter* Term, 1826, the Jury found a verdict for the plaintiff.—Damages 1*s*.

The defendant brought a writ of error in the Court of *King's Bench*, assigning for errors, "that the said *John Doe*, in each of the first and second counts of the said declaration, complained, that the defendant ejected him, the said *John*, from (amongst other things) *twenty tenements*, which are incorporeal, and a description of property for which an action of ejectment is not sustainable; and the description is too vague and uncertain; that the judgment was given, that the said *John Doe* should recover his terms of and in the said *twenty tenements*, in each of the said counts mentioned, without its appearing in, by, or from, the record aforesaid, in respect of what description of corporeal or incorporeal *tenements* the said *John Doe* was to recover his said term; and also, that the premises sought to be recovered, were specified and stated, in the declaration, to be situate in the parish of *St. Luke*, in the county of *Middlesex;* whereas there are two parishes known and called by the name of the parish of *St. Luke*, respectively, in the said county of *Middlesex:* and there was nothing on the record by which it appeared, or could be ascertained, in which of the said parishes the said tenements and premises were situate, &c." To this assignment the plaintiff demurred, shewing for cause: "That it is double and multifarious in this, to wit,

that it contains an assignment of errors in law, and an assignment of errors in fact; namely, that the defendant ejected the plaintiff, from, amongst other things, *twenty tenements;* also, that the said judgment is given, that the plaintiff should recover his terms of and in the said *twenty tenements*, &c., which are matters of law; and also, that there are two parishes known and called by the name of the parish of *St. Luke*, respectively, in the said county of *Middlesex*, which is matter of fact; and that, by the rules of law and pleading, a party is not allowed to assign error in law and error in fact, in the same assignment of errors."— The defendant joined in demurrer; and, on its coming on for argument in the last Term, the Court of *King's Bench* directed, that an application should be made to this Court for leave to amend the record.

Mr. Serjeant *Bompas*, on a former day in this Term, on an affidavit, by the plaintiff's attorney and his clerk, stating the proceedings in the cause, and that the words " twenty tenements" were introduced into the declaration by a mistake of the latter, without the knowledge of the former, who was not aware of such mistake until some time after the defendant had brought his writ of error, obtained a rule, calling on the plaintiff to shew cause, why the plaintiff's lessors should not be at liberty to amend the record in the cause, by striking out the words " twenty tenements," where the same occur, or to enter up judgment for the premises in the declaration mentioned, excluding " twenty tenements."

Mr. Serjeant *Wilde* now shewed cause, and submitted, that the application to amend the record should have been made to the Lord Chief Justice, before whom the cause was tried, and not to the Court. Although, in *Richardson* v. *Mellish* (*a*), where a general verdict was

(*a*) 3 Bing. 334.

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Doe d. Lawrie v. Dyball.

given on a declaration, some of the counts of which were bad, an application was made to the Court to amend the *postea*, by entering up judgment on a single count, after argument in error in the Court of *King's Bench*:—yet there, the cause was tried before Lord Chief Justice *Gifford*, who had been removed from this Court to the Rolls before the application for the amendment was made, and his notes were accordingly read in Court. But in *Harrison* v. *King* (*a*), where a verdict was taken generally for the plaintiff, the Court refused to entertain an application for entering it on particular counts, according to the evidence of the Judge's notes; and Mr. Justice *Abbott* there said, "If this were to be considered as an application to the Court, I should have no hesitation in saying, that the motion could not be entertained. The usual course, in cases of this kind, is, to apply to the Judge who tried the cause; when that is done, it belongs to the authority of the Court to amend the record." The reason that the application must be made to the Judge who tried the cause is, that he may refer to his notes of the evidence; and although here the word *tenements* was introduced improperly into the declaration, yet evidence was admissible as to the messuages and other premises for the recovery of which the action was brought. But the record is not here, in point of law; and if not, the Court can have no jurisdiction to make the required amendment. By intendment of law, the record is in the Court of *King's Bench*, to which the cause has been removed, and the Chief Justice has certified that he has sent it there; as, therefore, it must be considered as legally in the custody of the officer of the Court of *King's Bench*, and as the motion for the amendment should have been made to the Chief Justice who tried the cause, the Court will not interfere.

Mr. Serjeant *Bompas*, in support of his rule, after re-

(*a*) 1 Barn. & Ald. 161.

ferring to an *Anonymous* case (*a*), to shew that the record remains here, although the cause be removed to the Court of *King's Bench* by a writ of error, and stating that that Court had directed the present application to be made, was stopped by the Court.

Mr. Justice PARK.—With respect to the objection, that the application should have been made to my Lord Chief Justice, who tried the cause, it would have been well founded, if the amendment depended on a matter of fact, which arose at the trial; such, indeed, is the usual course. But the Judge who tried the cause may have the benefit of the advice or assistance of the Court. This, however, is not a question of fact, but of law, the word "tenements" having been improperly introduced into the declaration. Although in *Doe* d. *Stewart* v. *Denton* (*b*), it was held, that ejectment for a messuage *and tenement* was good after verdict; yet, in the subsequent case of *Doe* d. *Bradshaw* v. *Plowman* (*c*), the Court, on a review of all the authorities, held otherwise, and that the objection was good in arrest of judgment; and *Popham* (*d*), is there referred to by the reporter, where, on an issue joined in ejectment, and a verdict for the plaintiff, it was moved in arrest of judgment, because the ejectment was *de messuagio sive tenemento;* and ejectment does not lie *de tenemento*, nor *de messuagio et tenemento.* Besides, the Court of *King's Bench* directed this application to be made to us; and although it has been contended that we have no jurisdiction, yet that point was most fully considered in *Richardson* v. *Mellish*, where we, having amended the *postea*, after argument in error in the Court of *King's Bench*, ordered the judgment roll to be amended conformably to the *postea*, after judgment in er-

(*a*) 1 Salk. 49.
(*b*) 1 Term Rep. 11.
(*c*) 1 East, 441.
(*d*) P. 197.

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ror entered of record (*a*). Whether that Court has since done it, is not for me to enquire; but it is too much to call on us to overturn our judgment in so recent a case, and where we did not act without due consideration.

Mr. Justice BURROUGH.—I remember a similar application to this Court, independently of *Richardson* v. *Mellish*, where the amendment was allowed.

Mr. Justice GASELEE.—I am of opinion, that the present application need not have been made to my Lord Chief Justice. No difficulty was raised at the trial; and the objection is now founded on the inaccuracy of the record. It is quite clear, that ejectment will not lie for a tenement, as it is an uncertain description of property; and as it was improperly introduced into the declaration, it may be struck out, for the plaintiff may recover less than he declares for.

Rule absolute upon payment of the costs of the amendment.

(*a*) See 3 Bing. 346.

Thursday, Feb. 7th.

In an action by the owners of a ship against a broker employed by them to procure a cargo, the Court refused to order the latter to allow the former to inspect or take a copy of a letter received by him from a correspondent abroad, although he acted as such broker at the time.

ROWE and Others *v.* HOWDEN.

THE plaintiffs were the owners of the ship *Henry*, and *Rowe*, as the managing owner, employed the defendant in *April* last, as the broker, to procure freight: shortly afterwards, the defendant put a letter into *Rowe's* hands, dated *St. Vincent's*, 23rd *February*, 1827, signed by one *Grant*, a merchant there, addressed to the defendant, stating that he had two vessels to load for *London* in all next month, and that he would undertake to load a vessel of 200 tons, to sail in all the month of *June* next, for 100 guineas. In consequence of this letter, and the representation of the defendant, the plaintiffs, on the 12th *May*, sent out the ship *Hen-*

ry to *St. Vincent's*, for the purpose of bringing home sugar. Some time after the ship had sailed, *Rowe* called on the defendant, to learn if he had heard any thing about her, when he shewed him a letter, dated the 9th *March*, 1827, and marked with the *London* post-mark of the 9th *May*, and indorsed as having been received by the defendant on the 12th, in which *Grant* stated that he would not recommend sending out any ships, as the crops had failed. The plaintiff *Rowe* lately applied to the defendant to produce the letter, which he refused to do, but produced a duplicate, which he said was the only letter received by him from *Grant*, dated in *March* last, and which bore the *London* post-mark of the 16th *May*, 1827.

On an affidavit of these facts, Mr. Serjeant *Jones*, in the last Term, obtained a rule calling on the defendant or his attorney to shew cause why he should not produce to the plaintiffs' attorney the above letter, dated the 9th *March*, 1827, and bearing the *London* post-mark of the 9th *May* following, and why the plaintiffs' attorney should not be at liberty to inspect and take a copy thereof, as far as it related to the ship *Henry*.

Mr. Serjeant *Wilde*, now shewed cause, and after observing on the vagueness and insufficiency of the affidavit on which the application was founded, as it did not state for what cause the action was brought, or that the plaintiffs required the production of the letter, in order to enable them to declare, or for what other purpose they wanted it; and relying on the case of *Ratcliffe* v. *Bleasby* (a), where the principle, as to requiring a party to produce, or furnish a copy of, a written instrument in his possession, was fully and clearly established, was stopped by the Court, who called on—

(a) 3 Bing. 148.

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Mr. Serjeant *Jones* to support his rule.—It must be admitted, that, unless a party has an interest in an instrument which he seeks to inspect or to have produced, the Court will not interfere; but here the plaintiffs, as the owners of a ship, confided in the defendant as their broker; and all letters, papers, and documents relating to her or to the voyage on which she was engaged, should be disclosed and communicated to such owners; and if the contents of the letter in question had been made known to the plaintiffs, they would not have sent the ship out to *St. Vincent's*. The defendant must be considered as an agent acting for his principals; and if so, he holds the letter for them; and the plaintiffs cannot safely proceed to trial without inspecting it, or having a copy of it previously furnished to them. The plaintiffs are clearly parties interested; and therefore the defendant has no right to withhold the letter. In *Gigner* v. *Bayly* (*a*), the plaintiff having entered into a contract with an auctioneer, for the purchase of land by auction, and made a deposit in part of the purchase money, and afterwards brought an action against the defendants (the vendors) for interest, for not completing the purchase according to the conditions of sale, the Court ordered the defendants to produce the contract, for the purpose of the plaintiff's *inspecting it*, or getting it stamped. So here, as the plaintiffs, as the owners of the ship, employed the defendant as their broker, and acted entirely on his representations, they must be considered as standing in the situation of principal and agent; and if so, the latter holds the letter in question on behalf of the plaintiffs, and by their consent; or, at all events, in trust or confidence for them.

Mr. Justice PARK.—I am of opinion, that there is no ground for this motion. The principle on which such applications are founded, was fully considered in *Rat-*

(*b*) 5 B. Moore, 71.

cliffe v. *Bleasby*, where my Lord Chief Justice gave a learned and elaborate opinion; and we should act in direct opposition to it, if we were to make this rule absolute. It has been said, however, that the plaintiffs have an interest in all papers and documents belonging to their ship; but the letter in question forms no part of such documents, as it was received by the defendant in the course of correspondence between him and a third person residing at *St. Vincent's;* and we cannot compel a copy of such correspondence to be furnished by the defendant, to supply evidence against himself. If the plaintiffs think proper, let them go to trial, and give the defendant notice to produce the letter. It may, in some cases, be said that a plaintiff cannot declare without the previous inspection or production of an instrument; but it does not appear that the letter in question is wanted for that purpose. It is true, that, if two parties execute one deed or instrument, the one who has it holds it as trustee for the other, on the ground that they have both an interest in it. The case of *Gigner* v. *Bayly* appears to me to have no bearing on the present, as there the plaintiff required the contract to be produced for the purpose of getting it stamped; but here the defendant cannot be compelled to give the plaintiffs a copy of the letter in question; which may, if in his hands, be given in evidence at the trial.

Mr. Justice BURROUGH and Mr. Justice GASELEE concurring—

Rule discharged with costs.

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Friday, Feb. 8th.

In an action against the drawer of a bill of exchange, he pleaded the delivery of twenty pipes of port wine, in satisfaction:—The Court refused to allow the plaintiffs to sign judgment, as for want of a plea, although it was sworn, that the plea was altogether false.

On moving for a rule to plead several matters, the substance of the pleas must be stated to the Court.—*Per* Mr. Justice *Park*.

SMITH and Others *v.* BACKWELL.

THIS was an action brought by the plaintiffs against the defendant, the drawer of a bill of exchange, for 200*l*. The declaration was in the common form. The defendant pleaded:—"that after the making of the several promises and undertakings in the declaration mentioned, to wit, on &c., at &c., the defendant delivered to the plaintiffs twenty pipes of port wine, in full satisfaction and discharge of the several promises &c. in the declaration mentioned, and of all damages and sums of money thereupon due, owing, or accrued; and which said twenty pipes of port wine, the plaintiffs then and there accepted and received of and from the defendant, in full satisfaction and discharge of the said several promises &c., and of all damages and sums of money as aforesaid; and this &c., wherefore &c."

Mr. Serjeant *Stephen*, on a former day in this Term, obtained a rule calling on the defendant to shew cause, why the plaintiffs should not be at liberty to sign judgment in this cause, as for want of a plea, on the affidavit of one of the plaintiffs, which stated, that the plea was wholly false and untrue in substance and matter of fact; that the defendant never had delivered to the plaintiffs, or, to the best of the deponent's knowledge, information, and belief, to any or either of them, twenty pipes of port wine, or any port wine, in satisfaction or discharge of the promises or undertakings in the declaration mentioned, or on any other account; and that the plaintiffs never did accept or receive from the defendant the said twenty pipes of port wine, or any other port wine, or any other matter or thing, in satisfaction or discharge of the said promises and undertakings, or otherwise.

Mr. Serjeant *Spankie*, now shewed cause.—The plea of

accord and satisfaction, as pleaded in this case, is an usual and ordinary plea, and, if true, is an answer to the action, and the plaintiffs cannot call on the defendant to verify his plea. It must be observed, that he has not pleaded the general issue. If he had, he could not have put both pleas on the record without leave of the Court, but as he confined himself to one only, he has pleaded it at his peril; he required no time for pleading. In *Blewitt* v. *Marsden* (*a*), where a sham plea was pleaded, of judgments recovered in the Court of *Pie Poudre* in *Bartholomew Fair*, in terms palpably fictitious, and out of the regular course, the Court said, that there might be occasions where they would not enter into any question as to a plea of judgment recovered pleaded in the usual form, upon motion. Here, the plea was in the usual form, and the plaintiffs are not put to any expense. It, therefore, falls within the rule now laid down, and adopted by both Courts, that, unless a false plea be calculated to raise issues requiring different modes of trial, or be so ingeniously drawn as to perplex the plaintiff, or make it necessary for his attorney to consult counsel, and thereby cause delay and expense, the plaintiff will not be allowed to disregard it, and sign judgment. Although in *Richley* v. *Proone* (*b*), the Court permitted the plaintiff to treat a plea of this description as a nullity, and to sign judgment as for want of a plea, on an affidavit, stating that it was altogether false; yet that case was expressly over-ruled by *Merington* v. *Becket* (*c*), where a plea precisely similar was pleaded, and the Court said, that the case of *Richley* v. *Proone* was decided on the authority of what fell from Lord *Holt*, in *Pierce* v. *Blake* (*d*), which was only an authority to shew, that an attorney who puts a false plea upon the record

(*a*) 10 East, 237.

(*b*) 1 Barn. & Cres. 286; *S. C.* 2 Dow. & Ryl. 661.

(*c*) 2 Barn. & Cres. 81; *S. C.* 3 Dow. & Ryl. 231.

(*d*) 2 Salk. 515.

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may be fined; that it was very desirable that the proceedings should not be productive of unnecessary expense and delay; but that it was equally important that that object should be effected without breaking in upon any established principles, which would be the case, if a defendant were to be compelled to verify his plea; and Mr., now Lord Chief, Justice *Best*, is reported to have said (*a*): "The inclination of my opinion is, that *Richley* v. *Proone* was erroneously decided. I think the plea in that case should not have been set aside in the first instance, but that the attorney should have been called upon to state on whose authority he pleaded it." And in *Young* v. *Gadderer* (*b*), where the defendant, in an action against him as acceptor of a bill of exchange, pleaded a plea of judgment recovered for the same debt, the Court refused to set it aside as being a sham plea, or to permit the plaintiff to sign judgment, although it was sworn, that the defendant had admitted the debt, and had made repeated promises to the plaintiff to pay, after he had been served with process in the action. And Mr. Justice *Park* there said (*c*): "The plea put upon the record is the common plea of a judgment recovered, which is an ordinary defence, and we are not to assume that it is false;" and Mr. Justice *Burrough* added: "The Court must adhere to their former and established practice, and not introduce a new rule on a motion of this description, which, at all events, they have a discretion to grant or not."

Mr. Serjeant *Stephen*, in support of his rule.—This application is not unprecedented. The motion was precisely similar in *Richley* v. *Proone*, where the plea was identically the same as the present, and although the Court, in the subsequent case of *Merington* v. *Becket*, were of

(*a*) 3 Dow. & Ryl. 233.
(*b*) 8 B. Moore, 437; *S. C.* 1 Bing. 380.
(*c*) 8 B. Moore, 438.

opinion that that case was erroneously decided, yet Lord Chief Justice *Abbott* mentioned the case again, after the rule had been discharged, and said (*a*): "We have deliberated further upon this point, and we are of opinion, that the Court has no power to demand of a suitor an affidavit that his plea is true. We have also considerable doubt, whether the Court would be justified in calling on an attorney to shew by whose authority he pleads a dilatory plea, because that would, in all probability, be requiring him to divulge the confidential communications of his client. We now wish it, therefore, to be understood, that we lay down no general rule on this subject; we think it better, for the present, to let the practice remain as it is; and we intend, at our earliest convenience, to consider what mode can be safely adopted, either by the Court in the exercise of its own jurisdiction, or by recommendation to the Legislature for their interference, to remedy the evils at present complained of." In *Thomas* v. *Vandermoolen* (*b*), where the defendant, to a declaration in *assumpsit* for goods sold and delivered, and the money counts, pleaded, to the former counts, a judgment recovered, and to the latter, payment, the Court allowed the plaintiff to sign judgment as for want of a plea, and ordered the defendant, or his attorney, to pay the costs of the plea and of the application, on the ground that it was calculated to raise issues requiring different modes of trial. And in *Bartley* v. *Godslake* (*c*), where the defendant pleaded a sham plea, so as to make it necessary for the plaintiff's attorney to consult counsel, the Court suffered the plaintiff to sign judgment, and made the attorney pay the costs. So, in *Shadwell* v. *Berthoud* (*d*), the Court, in a like case, on an affidavit that the plea was false, allowed the plaintiff to

(*a*) 3 Dow. & Ryl. 233.
(*b*) 2 Barn. & Ald. 197.
(*c*) Id. 199.
(*d*) 5 Barn. & Ald. 750; *S. C. nomine Shadbolt* v. *Berthoud*, 1 Dow. & Ryl. 446.

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sign judgment; as also in *Body* v. *Johnson* (*a*); and in *Corbett* v. *Powell* (*b*), which was an action of debt on bond, by an executor, the defendant pleaded an assignment of the bond, before the death of the testator, and payment to the assignee; the plaintiff, in his replication, took issue on the payment to the assignee; and a *similiter* was, according to the ordinary practice, added in the office, and, after notice of trial given, the defendant struck out the *similiter*, and demurred specially to the replication; on an affidavit that the plea was false, the Court held, that, notwithstanding the plaintiff's delay, he might sign judgment as for want of a plea. In *Young* v. *Gadderer* there was no affidavit that the plea was false. Here, however, it is expressly sworn to be so; and the obvious tendency of the plea is, to vex the plaintiffs, and throw them over the Term. In *Blewitt* v. *Marsden* (*c*), the Court first reprobated the practice, which had then lately grown up, and was continually increasing, of loading and degrading the rolls of the Court with sham pleas, by which it sometimes happened that the time of the Court, which ought to be better employed, and was sufficiently engaged with the real business of the suitors, was taken up in futile investigations of nice points which might arise on demurrers to such sham pleas; and, therefore, in order effectually to put a stop to this practice in future, they allowed the plaintiff to sign judgment as for want of a plea, and made his attorney pay all the costs occasioned by the plea, and the costs of the rule for correcting the proceedings. Although a plea of judgment recovered may frequently be a true plea, yet, as accord and satisfaction may be given in evidence under the general issue, and is seldom pleaded, otherwise than as a sham plea for delay, the Court ought not to tolerate it

(*a*) 5 Barn. & Ald. 751, n. 3.
(*b*) 1 Dow. & Ryl. 448; *S. C.* 5 Barn. & Ald. 751, n.
(*c*) 10 East, 237.

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when it is sworn, as here, that it is altogether false, and when it is evidently merely pleaded for delay.

Mr. Justice PARK.—The Court cannot comply with the terms of this motion, although I very much regret it. If this be a sham plea, it is to be lamented that it has been put upon the record; and there is no doubt but that it is so, as one of the plaintiffs has expressly so sworn, and the defendant has not attempted to answer the affidavit. There is, however, only one instance where the Court required an affidavit from the defendant in verification of his plea. *Blewitt* v. *Marsden*, which was decided in 1808, was a case wholly different from this. Here, as there is no inconsistency in the plea of accord and satisfaction by delivery of wine, which is in the usual form, we cannot say that there is any fallacy, or that it is fictitious on the face of it; whereas, there, the defendant pleaded judgments recovered in the Court of *Pie Poudre*, in *Bartholomew Fair;* and, on my applying for a rule to shew cause why the plaintiff should not be at liberty to sign judgment as for want of a plea, treating it as a nullity, it being palpably, and upon the face of it, a sham plea, the Court said, that there might be occasions where they would not enter into any question as to the truth of a plea of judgment recovered pleaded in the usual form, upon motion, but await the time for producing the roll, when such a plea would be regularly disproved. To that I fully accede. I, therefore, think that we should overstep our authority, if we were to yield to this application. The case of *Richley* v. *Proone* appears to have been heard and determined at the Sittings in the Court of *King's Bench* after Term, in the absence of the Lord Chief Justice, and that Court, without assigning any reasons, made the rule absolute. But in the subsequent case of *Merington* v. *Becket*, that of *Richley* v. *Proone* was fully considered, and the Court, after hearing counsel in support of and against the rule,

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said, that the case of *Richley* v. *Proone* was decided upon the authority of what fell from Lord *Holt*, in *Pierce* v. *Blake* (*a*), which was only an authority to shew that an attorney, who puts a false plea upon the record, may be fined; and on a subsequent day, Lord Chief Justice *Abbott* said, that calling upon an attorney to shew by what authority he put a sham plea upon the file, might not be effectual, and that the Court would consider, whether some means could not be adopted for the prevention of sham pleading, without breaking in upon any established principle: but that until some such regulation could be devised, the practice must remain as it had been theretofore.

In *Young* v. *Gaddarer*, in an action against the defendant, as acceptor of a bill of exchange, this Court refused to set aside a plea of judgment recovered, as being a sham plea, or to permit the plaintiff to sign judgment, although it was sworn, that the defendant had admitted the debt, and had made repeated promises to the plaintiff to pay, after he had been served with process in the action; and that case was not decided without due consideration. In *Bones* v. *Punter* (*b*), an action on a bill of exchange, the defendant pleaded, to the whole declaration, *first*, a judgment recovered in this Court, and, *secondly*, by leave of the Court, the delivery of a hogshead of tobacco in satisfaction; the Court, on the plaintiff's producing an affidavit of the falsehood of the pleas, permitted him to sign judgment; but there the pleas were such as raised two distinct issues, requiring different modes of trial, which brought the case within the rule then recently adopted, *viz.* that, if a false or sham plea were calculated to raise issues requiring different modes of trial, or were so ingeniously drawn as to perplex the plaintiff, or make it necessary for his attorney to consult counsel, and thereby cause delay and expense,

(*a*) 2 Salk. 515. (*b*) 2 Barn. & Ald. 777.

the plaintiff might sign judgment as for want of a plea. There, too, the Court observed, that the rule to plead double was granted as a matter of course; that it had been improperly obtained; and that, it appearing (on affidavit) that the pleas were false, the plaintiff was entitled to sign judgment. In future, on a motion for a rule to plead several matters, we shall require the substance of the pleas to be stated to us, in order to ascertain whether they are fit pleas to be put on the record or not; and if a party be under terms to plead issuably, the Court always exercises a control over the pleas intended to be filed, and imposes terms accordingly. Here, however, the defendant has pleaded one plea only, and was under no terms to plead. I am, therefore, bound to yield to the authority of *Merington* v. *Becket*, and trust, in the words of Lord Chief Justice *Abbott*, that some regulation may be made to prevent sham pleading, without breaking in upon any established principles.

Mr. Justice BURROUGH.—I object to this motion *in toto*, and it appears to me that there is no colour or foundation for it. If this rule were made absolute, it might hereafter be said, that a defendant shall not plead the general issue without verifying it by affidavit. This form of plea is sometimes more convenient to a plaintiff than the general issue; because it puts only one fact in issue, and it lies with the defendant to prove his case. The Court, in the late case of *Young* v. *Gadderer*, refused to set aside a plea of judgment recovered, although the defendant admitted the debt, and promised the plaintiff to pay, after he was served with process; and here, the plaintiffs may rule the defendant to abide by his plea, which will be most beneficial for them. We therefore never ought to disturb such a plea; and the true ground of distinction is, that pleas in abatement, which are brought only for delay, must be verified by the oath of the party.

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Mr. Justice GASELEE.—I am of the same opinion. So long as a judgment recovered is permitted to be pleaded, I see no reason why this plea, which is equally common, should not be allowed also. It involves no difficulty, nor is it so subtilly framed as to require the advice of counsel, nor does it raise two distinct issues, so as to require different modes of trial.

Rule discharged without costs.

The Court observed, that, in future, such applications would be discharged *with* costs.

Friday, Feb. 8th.

In an action against two Justices of the Peace for illegally convicting the plaintiff, and issuing a warrant of distress against his goods, the notice of action stated the warrant to have been *directed to A. B.*, and when produced at the trial, it was found to have been *directed to C. D., constable of H.*:—Held, a fatal variance, although *A. B.* executed the warrant.

AKED *v.* STOCKS, Esq. BARSTOW, Esq., and seven Others.

THIS was an action of trespass. The declaration stated, that the defendants, on the 3rd *March*, 1827, broke and opened a certain workshop or warehouse of the plaintiff, situate in the parish of *Halifax*, in the county of *York*, and seized, took, and distrained, certain furniture, goods, and chattels, of the plaintiff, to wit, &c. &c., then being in the said workshop, and carried away the same, and converted and disposed thereof to their own use. Two of the defendants, who were Justices of the Peace for the county of *York*, pleaded not guilty, and the other seven suffered judgment by default.

At the trial, before Mr. Justice *Bayley*, at the last Summer Assizes for *Yorkshire*, it appeared that the plaintiff was a maker of cards (articles used for clothing the engines that manufacture wool or cotton), residing at *Halifax*; that the defendants, *Stocks* and *Barstow*, were magistrates of the county of *York*; that three others, *viz. Bark*, *Medley*, and *Rushworth*, were special constables; that *Fletcher* and *Marshall*, two other of the defendants, were their assistants; and that the two remaining defend-

ants were, *Wood*, a journeyman card-maker, and his wife. The alleged trespass was committed under the following circumstances:—

The defendant *Wood* was employed by the plaintiff to make a quantity of cards for him. On the work being finished, the plaintiff requested *Wood* to bring it home, but he declined to do so until he had first been paid his wages. On the plaintiff's refusing to pay *Wood* his wages until the work had been delivered, examined, and approved, he obtained, from the defendant *Stocks*, a summons, requiring the plaintiff to appear before him *(Stocks)* to shew cause why he did not pay *Wood* 10*l.* for wages due to him. The parties accordingly, on the 13th *February*, 1827, appeared to the summons, before Mr. *Stocks* and Mr. *Barstow*, who postponed the hearing until the 20th, directing, that, in the mean time, the work should be examined, and the amount of wages due to *Wood* ascertained, by two individuals, one to be named by the plaintiff, and the other by *Wood*. This not being complied with on the part of the plaintiff, Mr. *Stocks* and Mr. *Barstow*, on the said 20th *February*, made an order, which was served upon the plaintiff, requiring him to pay to *Wood* 10*l.* for his wages, and 15*s.* for costs; which not being paid, the other seven defendants entered the plaintiff's shop on the 3rd *March*, under a warrant of distress signed by *Stocks* and *Barstow*, and seized goods belonging to the plaintiff, which they carried away, and afterwards sold. The defendant *Bark* produced the warrant of distress, which he read to the plaintiff, and also made a schedule of the articles seized, which he signed. The following notice of action was served upon *Stocks* and *Barstow*:—

"To *Michael Stocks* and *William Barstow*, Esqrs., two of his Majesty's Justices of the Peace, in and for the West Riding of the county of *York*.

"You having, on or about the twentieth day of *Febru-*

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ary last, as two of his Majesty's Justices of the Peace in and for the West Riding of the county of *York*, caused *John Aked*, of *Halifax*, in the said county of *York*, card-maker, to be unlawfully convicted, for not paying to *Thomas Wood*, of *Halifax* aforesaid, card-maker, the sum of 10*l.*, for wages supposed to be due to the said *Thomas Wood*, and the further sum of 15*s.*, for costs alleged to have been incurred by the said *Thomas Wood* in recovering the said wages; and you having unlawfully issued a certain warrant in writing, under your hands and seals, bearing date on or about the 3rd *March*, 1827, *directed to Joseph Bark*, thereby commanding him to distrain the goods and chattels of the said *John Aked*, for satisfying the said sum of 10*l.* 15*s.*, under which said warrant of distress the premises of the said *John Aked*, situate at *Halifax* aforesaid, were unlawfully entered, and his goods and chattels therein, of a large value, forcibly taken and distrained; and having afterwards caused the said goods and chattels of the said *John Aked* to be sold and disposed of, to his great loss and prejudice: I do, therefore, as the attorney for the said *John Aked*, according to the form of the statute in such case made and provided, hereby give you notice, that I shall, at, or soon after, the expiration of one calendar month from the time of your being served with this notice, cause a writ of *capias ad respondendum* to be issued out of his Majesty's Court of *Common Pleas*, at *Westminster*, against you, at the suit of the within-named *John Aked*, for the wrongs aforesaid, and shall proceed against you thereupon according to law.

Dated this 24th day of *May*, 1827.

W. F. H., Attorney for the said *John Aked*."

The plaintiff having given the defendants notice to produce the warrant of distress; on its being put in, it was found not to be directed *to Bark*, as alleged in the notice, but to "*John Brierley*, constable of *Halifax*;" and *Bark*

was proved to be a constable of *Northowram*, and not of *Halifax*; when it was objected for the defendants, that, as the warrant was not directed to *Bark*, as stated in the notice, the action could not be maintained against the magistrates who granted it, as they were not liable for *Bark's* acts, although he held and executed the warrant, it not being directed to him; or that, at all events, there was a fatal variance between the warrant set out in the notice, and that signed by the defendants.

The learned Judge was of opinion, that, as the notice of action served on the magistrates stated the warrant of distress to have been directed to *Bark*, when in fact it was directed to *Brierley*, Constable of *Halifax*, the action could not be supported.

The Jury accordingly assessed the damages against the seven defendants who had suffered judgment by default, at 28*l*., the value of the goods proved by the plaintiff to have been taken under the warrant, and returned a verdict of not guilty against *Stocks* and *Barstow*—leave being reserved to the plaintiff to move to enter a verdict of guilty against them, if the Court should think the notice sufficient.

Mr. Serjeant *Cross* having, in the last Term, obtained a rule *nisi* to that effect—

Mr. Serjeant *Wilde* was, on this day, about to shew cause, when the Court called on—

Mr. Serjeant *Cross*, to support his rule.—The statute 24 *Geo. 2*, c. 44 (*a*), requires that the notice shall clearly and explicitly shew the plaintiff's cause of action. The intent and meaning of the act was, that, before an action should be commenced against a Justice of the Peace for any thing

(*a*) Sect. 1.

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done by him in the discharge of his duty, he should be clearly informed of all that is meant to be charged against him, that he might have an opportunity to tender amends to the complaining party, to avert the consequences of his error; and here the plaintiff has done all that could reasonably be expected of him, and all, indeed, that it was possible for him to do, in order to afford the defendants the requisite information. He had no copy of the warrant. All, therefore, that he could know, was, that it was issued under the hands of two magistrates; and, as it was *executed by Bark*, he naturally concluded that it was *directed* to him. The notice could not be more explicit; for it expressly stated that the action was brought against the defendants, *Stocks* and *Barstow; first*, for having caused the plaintiff to be unlawfully convicted for not paying to *Wood* the sum of 10*l.* for wages supposed to be due to him; and, *secondly*, for having unlawfully issued a warrant in writing, under their hands and seals, against the goods of the plaintiff, under which they were sold.

[Mr. Justice *Park*.—The fifth section of the statute enacts, "that no evidence shall be permitted to be given by the plaintiff, on the trial, of any cause of action, except such as is contained in the notice thereby directed to be given;" and here the plaintiff has stated that the defendants unlawfully issued a warrant, *directed* to *Joseph Bark*, which, on its production, appeared to have been directed to another person.]

It must be admitted, that there is a literal variance; but the objection is trivial, and frivolous, if not vexatious, as the directions of the statute have been substantially complied with; for a more explicit notice could not, under the circumstances, have been given. The plaintiff's attorney most unfortunately added that the warrant was *directed* to the person who *executed* it, and there can be no doubt but that it was signed by the two defendants, and those who suffered judgment by default are

mere paupers. If the plaintiff could have proved that a letter, containing the warrant, had been addressed to *Bark*, there can be no doubt but that the magistrates would be liable as co-trespassers. The notice need not have been more explicit than the declaration. The warrant might have been delivered in the first instance to *Wood*, the complaining party, or to *Bark;* and it is immaterial whether it were directed to the latter or not, for the plaintiff's cause of complaint against the magistrates is, that he was unlawfully convicted, and that the warrant was unlawfully issued. Although the plaintiff frequently demanded the perusal and copy of the warrant from the three defendants who acted as constables, they refused it. The objection raised by the magistrates is not only disgraceful to them, but tends to defeat the ends of justice.

Mr. Justice PARK.—I should feel disposed to go every possible length, in support of the arguments that have been urged in favour of the plaintiff's case, if I could possibly do so; for I am always sorry to see the merits of a cause defeated by a formal or technical objection; and during the twelve years I have had the honour of presiding at *Nisi Prius*, I have always been averse to nonsuit a party, on the ground of a variance, which, although of a trifling nature, frequently defeats the plaintiff's right. We can have no disposition, nor have we a power, to favour magistrates; they must stand with us on an equal footing with all other individuals. But here the objection is founded on the insufficiency of the notice of action, required by the statute *24 Geo. 2*, c. 44, which was passed expressly for the purpose of rendering Justices of the Peace more safe in the execution of their office, because country magistrates cannot be supposed to be acquainted with all the niceties and technicalities of law, and they are often in danger of being entrapped by making

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mistakes in mere matters of form; and on a notice of action being served on them, they are to be put in possession of the cause, in order that they may tender amends to the complaining party. These notices have always received a strict construction. The only question, therefore, is, whether the notice in this case conveys sufficient information to the defendants, of the plaintiff's cause of action. A notice of this description must express the nature of the writ, or process, intended to be sued out, as well as of the cause of action, according to the decision of the Court in *Lovelace* v. *Curry* (*a*); and in *Strickland* v. *Ward* (*b*), it was held, that a notice given, pursuant to the statute, stating, that an action *on the case* for false imprisonment and assault would be brought against the defendant (a magistrate), was held to be insufficient. But it has been since held, that the notice need not specify the *form* of the action intended to be brought. It is sufficient, if it state the writ or process, and the *cause* of action, *Sabin* v. *De Burgh* (*c*). It was, perhaps, unnecessary in this case to have stated, that the warrant was *directed* to *Bark*; but, having stated it, and professed to give the defendants the whole of his cause of action, the plaintiff was bound to prove it. The notice addressed to the defendants stated, that they, as Justices of the Peace for the county of *York*, had caused the plaintiff to be unlawfully convicted for not paying wages supposed to be due to one *Wood*, and had unlawfully issued a certain warrant, under their hands and seals, dated the 3d *March*, 1827, *directed* to *Joseph Bark*, thereby commanding him to distrain the plaintiff's goods, under which warrant his premises were unlawfully entered, and his goods forcibly taken and sold. That was the plaintiff's *cause* of action; and, on the production of the warrant, it appeared to have been directed to one

(*a*) 7 Term Rep. 631. (*b*) Id. n. (*c*) 2 Camp. 196.

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John Brierley, an entire stranger, as he was not one of the parties to the record, and he was further described as *a constable of Halifax*. There can be no doubt but that this was a fatal variance. The sixth section of the statute was passed for the protection of constables and other officers, acting in obedience to the warrants of magistrates; and although they need not comply with the demand of the perusal and copy of the warrant; yet unless they do so, they are not protected. The fifth section enacts, that no evidence shall be permitted to be given by the plaintiff, of any cause of action except such as is contained in the notice; and here the plaintiff's cause of action is founded on the warrant of distress issued by the defendants, as magistrates, directed to a particular person by name, as constable of *Halifax*, and stated in the notice to be directed to another, who was not a constable of that township. I am therefore of opinion, that the action, as against the two first named defendants, as magistrates, cannot be maintained.

Mr. Justice GASELEE (*a*).—I should be extremely happy if we could, consistently with the terms of the statute, and the cases decided as to its construction, accede to the present application; but notices of this description have always been construed strictly. The plaintiff has obtained a verdict against the constables and others who assisted at the execution of the warrant, and who, believing that they had no authority to act under it, suffered judgment by default. I therefore feel a less difficulty, as, if the plaintiff had brought his action against the magistrates alone, he must have failed altogether; but he is now entitled to proceed against the other defendants for the recovery of the damages assessed against them, *viz.*

(*a*) Mr. Justice *Burrough* was absent at Chambers.

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28*l.* the value of the goods taken under colour of the warrant. The statute requires that the cause of action be clearly and explicitly contained in the notice. The case of *Strickland* v. *Ward*, is expressly in point, and that case has been admitted to be law, and has been since approved of. In *Sabin* v. *De Burgh* (*a*), it was held, that the notice need not specify the *form* of action; but that it is sufficient if it state the *writ* or *process*, and the *cause* of action; so here, the notice would have been sufficient, if it had stated the warrant in general terms, and the cause of action as stated in the declaration, *viz.* that the defendants unlawfully entered the plaintiff's workshop or warehouse by virtue of the warrant, and distrained and sold his goods. But the plaintiff has gone further, and stated, that the defendants unlawfully issued a warrant *directed* to *Bark*, under which the premises of the plaintiff were unlawfully entered, and his goods taken and distrained. That statement was incorrect, as far as it regarded the party to whom the warrant was directed; for it was directed to a constable of *Halifax*, and it was proved that *Bark* was not a constable of that township.

Rule discharged (*b*).

(*a*) 2 Camp. 196.

(*b*) The grounds of objection to the proceedings of the magistrates were—*First*, that they had ordered the plaintiff to pay 10*l.*; whereas, by the statute, 20 *Geo.* 2, c. 49, s. 1, they were only empowered to convict for 5*l.*; the statute 4 *Geo.* 4, c. 34, s. 4, which extends the sum to 10*l.*, being confined to cases where the master resides at a distance from his place of business, or is absent; neither of which was the case here: *Secondly*, that the *twenty-one* days required by the 20 *Geo.* 2, between the conviction and the issuing of the distress-warrant had not expired when the Justices signed it, and the levy was made under it.

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Monday, Feb. 11th.

BRYSON *v.* SIMCOX.

The defendant was arrested for 30*l.* At the trial, it appearing that the plaintiff was indebted to the defendant in a small sum, a verdict was taken for the former, for nominal damages, subject to a reference to an arbitrator for ascertaining the amount, and he found that 12*l.* only were due from the defendant to the plaintiff:—Held, that the defendant was not entitled to costs under the statute 43 *Geo.* 3, c. 46, s. 3, although he had tendered the sum awarded before the commencement of the action, as he ought to have pleaded the tender.

THE defendant in this cause was arrested and held to bail for 30*l.*, stated to be due from him to the plaintiff for work and labour as an accountant. At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after the last *Trinity* Term, it appeared, that the defendant had assisted the plaintiff, and that he was indebted to him in a small sum for his services, when a verdict was taken for the plaintiff, subject to an order of reference for ascertaining the amount of the damages; and the arbitrator awarded, that the sum of 12*l.* 10*s.* only was due from the defendant to the plaintiff; and he directed a verdict to be entered for that sum.

Mr. Serjeant *Taddy*, on an affidavit, stating that the sum found to be due by the arbitrator had been tendered by the defendant previously to the commencement of the action, applied for a rule *nisi* to tax the costs for the defendant, under the statute 43 *Geo.* 3, c. 46, s. 3, on the ground that he had been arrested and held to bail maliciously, and without any probable cause. The learned Serjeant referred to *Tidd's Practice* (*a*), to shew, that where a verdict is taken at the trial for a nominal sum, subject to an order of reference for ascertaining the amount of the damages, it is within the terms of the statute; and he cited the case of *Austin* v. *Debnam* (*b*) to shew, that, where there are mutual dealings between two parties, and items known to be due on each side of the account, an arrest for the amount of one side of the account, without deducting what is due on the other, is malicious, and without probable cause; and *Robinson* v. *Elsam* (*c*), where an

(*a*) 7th Edit. 998.

(*b*) 3 Barn. & Cres. 139; *S. C.* 4 Dow. & Ryl. 653; S. P. *Drone-field* v. *Archer*, 5 Barn. & Ald. 513. *S. C.* 1 Dow. & Ryl. 67.

(*c*) 5 Barn. & Ald. 661.

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attorney brought an action for his bill of costs, and held the defendant to bail for a larger sum than was afterwards found to be due upon taxation, without having any reasonable or probable cause for so doing, and it was held to be a case within the statute.

Mr. Justice PARK.—In that case, the Court proceeded on the grounds, that although it was not within the statute, still that they, in the exercise of their jurisdiction over their officers, would compel an attorney, under such circumstances, to pay costs; and Lord Chief Justice *Abbott* there said, "It is unnecessary to decide whether this case be within the statute, because the plaintiff is an attorney." I am of opinion that case does not fall within the meaning or provisions of the statute. The defendant ought to have pleaded his tender, if he had made it before the commencement of the action. I therefore think that there is no ground for us to interpose.

Mr. Justice BURROUGH.—In *Pain* v. *Acton* (*a*), the defendant was arrested for 100*l.*, and the cause was afterwards referred to an arbitrator, who found that 20*l.* only were due from him to the plaintiff; and we held, that the defendant was not entitled to his costs under the statute, on the ground of an arrest without probable cause.

Mr. Justice GASELEE.—The latest case on this statute is that of *Keene* v. *Deeble* (*b*), where a defendant was arrested and held to bail for 28*l.*, and paid 2*l.* into Court, and afterwards, the cause, before it came on for trial, and all matters in difference, were referred to an arbitrator, who was empowered to examine the parties and call for books, &c., and it was agreed that the costs should abide the event; the arbitrator having awarded the plaintiff the sum of 1*l.* 19*s.*, a motion was made on the part of the defendant, for

(*a*) 3 B. Moore, 605; *S. C.* 1 Brod. & Bing. 278.

(*b*) 3 Barn. & Cres. 491; *S. C.* 5 Dow. & Ryl. 383.

his costs; but it was held not to be a case within the statute.

Rule refused (*a*).

(*a*) See *Thompson* v. *Atkinson*, 6 Barn. & Cres. 193.

STEPHENSON *v.* HART and WATERHOUSE.

Monday, Feb. 11*th.*

A carrier is bound to deliver goods entrusted to him at the place to which they are addressed; and if he deliver them elsewhere, trover lies against him. *Secus* if goods be stolen or lost. Where, therefore, the defendants, as carriers, had received a box at *Birmingham*, directed to *J. West*, 27, *Great Winchester Street, London*, and, on its being taken there, the house was found to be shut up, and no person of the name of *West* resided in the street, and a week afterwards the defendants received a letter from a person naming himself *West*, desiring that the box might be sent to him at an inn at *St. Albans* which the defendants accordingly did:

THIS was an action on the case, against the defendants, as carriers, for the loss of a box. The *first* count of the declaration stated, that, on the 30th *September*, 1826, at *Birmingham*, in the county of *Warwick*, the plaintiff caused to be delivered to the defendants, and the defendants then and there accepted and received of and from the plaintiff, a certain box, containing certain money, goods and chattels, to wit, six sovereigns, one half sovereign, and four thousand combs, of the plaintiff, of great value, to wit, of the value of 50*l.*, to be safely and securely carried and conveyed by the defendants from *Birmingham* to *London*, and there safely and securely to be delivered *for the plaintiff*, for certain reasonable reward to the defendants in that behalf. Yet the defendants, not regarding, &c., but contriving, &c., did not, nor would, safely or securely carry or convey the said box and its contents aforesaid from *Birmingham* to *London*, nor there, to wit, at *London*, safely or securely deliver the same *for the plaintiff*, but, on the contrary, that the defendants so carelessly and negligently behaved and conducted themselves in the premises, that by and through the carelessness, negligence, and default, of the defendants, the said box, and its contents aforesaid, being of the value aforesaid, became and were wholly lost to the plaintiff.

The *second* count stated, that the plaintiff caused to be

—Held, that this was a mis-delivery, for which they were liable in trover, although *West* was the person for whom the box was intended, the property in the goods not having passed to *West*, as he had obtained them from the plaintiff by fraud; and that it was properly left to the Jury to say, whether the defendants had caused the goods to be delivered in the due and ordinary course of business, and according to their duty as carriers.

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delivered to the defendants, and the defendants accepted and received of and from the plaintiff, a certain other box, containing money and goods, to be safely and securely kept by the defendants, *for the plaintiff*, and to be re-delivered by the defendants, on demand, to the plaintiff. Yet, that the defendants, not regarding, &c., but contriving, &c. did not, nor would, safely or securely keep the said last-mentioned box, and its contents aforesaid, or any part thereof, for the plaintiff; nor did nor would, although the plaintiff afterwards, to wit, on &c., at &c., aforesaid, demanded the said last-mentioned box, and its contents aforesaid, of and from the defendants, or at any time thereafter, re-deliver the same to the plaintiff; but, on the contrary thereof, the defendants so carelessly &c., conducted themselves, that, by and through the carelessness &c., of the defendants, the said last-mentioned box, and its contents aforesaid, were wholly lost to the plaintiff.

The *third* count was trover for the contents of the box. Plea—Not guilty.

At the trial, before Lord *Tenterden*, at the last Assizes for the county of *Warwick*, the facts of the case appeared as follows:—The plaintiff, a comb-maker at *Birmingham*, in *September*, 1826, sold a quantity of combs, amounting in value to 31*l.* 7*s.* 6*d.*; to a person of the name of *West*, who gave him in payment a bill of exchange for 50*l.*, purporting to be drawn in *Edinburgh*, on the 29th *August*, 1826, by *H. De Gueria*, upon and accepted by *J. P. Le Conte & Co.*, merchants, *Devonshire Square*, *London*, payable at three months after date, at Messrs. *Smith Payne & Smith's*; which was indorsed by *De Gueria*, the drawer, and the Royal Bank of *Scotland*; and which *West* indorsed to the plaintiff, receiving 10*l.* in cash; and desiring the remainder, 6*l.* 10*s.*, to be enclosed with the combs: and he requested them to be directed to him, at No. 27, *Great Winchester Street*, *London*. The plaintiff accordingly, on the 30th *September*, having first caused the bill to be discounted, sent to the *Swan* coach-office,

at *Birmingham*, kept by the defendant *Hart*, a box, containing the combs, and six sovereigns and a half, directed to "*J. West*, Esq., *27, Great Winchester Street, London*," to be forwarded by the *Balloon* coach, which ran from *Birmingham* to *London*, and of which the defendants were the proprietors. The box arrived in due course at the office of the defendant *Waterhouse*, in *Lad Lane*, and was taken to No. *27, Great Winchester Street*, as directed, but the porter, who took it, found the house shut up, and that no such person as *J. West* resided, or was known, at No. *27*, or at any of the adjoining houses in that street. The box was therefore taken back to the coach-office, and remained in a warehouse there, until the following note was received:—

"Messrs. *Waterhouse & Co., Swan-with-two-necks, Lad Lane.*

"*St. Alban's, Oct.* 7th, 1826.

"Gentlemen,—A parcel was sent, about a week ago, from *Birmingham*, by the mail that leaves that place at a quarter before six in the evening, directed, by mistake, to Mr. *West*, No. *27, Great Winchester Street, London;* but which ought to have been directed to me, at *St. Alban's*. You will, therefore, be so good as to forward it by the first coach that leaves your office, and let it be directed, to be left at the *Pea Hen*, here.

J. West.

"Please to forward it, without fail, by the *Eclipse*, to-morrow morning."

The box was sent, as requested, to the *Pea Hen, St. Alban's;* and it was proved, that, on its arrival, *West* opened it, and paid his bill at the inn out of the sovereigns packed up in the box, which, before he opened it, he said contained money. When the bill became due (*viz.* on the 1st *December*), neither the drawer nor the acceptors could be found, and the plaintiff having learnt that the address given him by *West* was a fictitious one, wrote to the defendant *Waterhouse*, requiring to know what had become of

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the box, when his book-keeper replied, that it had been sent back to the office at *Birmingham*, from whence it came; but on enquiry being made there, the plaintiff ascertained that it had never been returned, and that the parties had seen nothing of it since it was forwarded to *London*. The plaintiff then demanded payment of its value from *Waterhouse*, and, on his refusal to comply, the present action was commenced.

His Lordship, after stating, in the progress of the cause, that there was no doubt but that *West* had obtained the goods from the plaintiff by fraud, and that it was altogether a swindling transaction; left it to the Jury to say, whether or not the defendants had caused the box to be delivered in the due and ordinary course of business, and according to their duty as carriers. They thought not; and accordingly found a verdict for the plaintiff.—Damages, 37*l.* 17*s.* 6*d.*, the value of the contents of the box.

Mr. Serjeant *Adams*, in the last Term, obtained a rule calling on the plaintiff to shew cause, why this verdict should not be set aside and a nonsuit entered, or a new trial granted, on the grounds—*First*, that the plaintiff had not a sufficient property in the goods to maintain the action, as it had passed from him to *West*; and, *secondly*, that the defendants were justified in delivering the box to *West*, at *St. Alban's*, he being the person to whom it was directed, and for whom it was in fact intended, although he did not reside at the place to which it was addressed.

Mr. Serjeant *Bosanquet* now shewed cause.—The only question is, whether the defendants have not been guilty of negligence. In *Batson* v. *Donovan*, Mr. (now Lord Chief) Justice *Best* said (*a*): "A carrier and his servants must take the same care of property committed to their charge, as a prudent man would take of his own;" and if

(*a*) 4 Barn. & Ald. 30.

he do not, he is liable in a case of loss. The question then is, whether or not, in this case, the defendants exercised a reasonable and proper degree of caution. The facts are shortly these:—A person, calling himself *West*, obtained goods from the plaintiff, at *Birmingham*, and directed him to send them to *27, Great Winchester Street, London*, The plaintiff accordingly sent a box containing the goods, so directed, to the defendants' coach-office, at *Birmingham;* it was therefore their duty, as carriers, to deliver it according to the direction. They endeavoured to do so, but found the house shut up, and that *West* did not live there, nor could any intelligence be had as to his place of residence, as no person in the street answered the description of *West*. A week afterwards, a letter was received by the defendant *Waterhouse*, from *St. Alban's*, from a person naming himself *J. West*, stating, that the parcel was directed to *Great Winchester Street* by mistake, and requesting that it might be sent to him at an inn at *St. Alban's;* and there it was accordingly sent, without any enquiry being made. Was that taking such care of the goods entrusted to the defendants, as a prudent man would have taken of his own? But it has been said, that if the goods were ultimately received by the person to whom they were directed, and for whom they were intended, the defendants would not be liable.

[Mr. Justice *Gaselee*.—Did not the plaintiff part with the possession of the goods? In *Dawes* v. *Peck* (*a*), it was held, that if the consignor of goods deliver them to a particular carrier, by order of the consignee, and they be afterwards lost, the consignor cannot maintain an action against the carrier for the loss, although he paid for booking the goods; and that the action can only be brought by the consignee; and, therefore, did not the goods in question, when delivered to the defendants, become the property of *West?*]

The goods were obtained from the plaintiff by swind-

(*a*) 8 Term Rep. 330.

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ling and fraud. The bill given in payment was drawn and accepted by fictitious parties. There were no such persons in *Devonshire Square* as Messrs. *Le Conte & Co.*, nor any person by the name of *West* in *Great Winchester Street*. The whole transaction was bottomed in fraud; and it has been decided in many cases, that where goods are obtained by fraud no property passes. In *Duff* v. *Budd* (*a*), the plaintiffs having received an order from a stranger, to furnish goods to *J. Parker*, of *High Street, Oxford*, and finding, upon enquiry, that Mr. *Parker*, of *High Street*, was a tradesman of respectability, forwarded the goods by the defendant, a carrier, directed to "Mr. *James Parker, High Street, Oxford.*" On the arrival of the parcel at *Oxford*, the defendant's porter, who knew Mr. *William Parker*, of *High Street*, and that no other person of the name of *Parker* lived there, meeting him, told him of the arrival of the parcel. Mr. *William Parker* said, he expected no such parcel. A person, whose residence was not known, but to whom the porter had before delivered parcels directed, "Mr. *Parker, Oxford*, to be left till called for," called at the defendant's office, shortly afterwards, for the parcel, and was allowed to take it on paying the carriage. This person turned out to be a swindler, and the Jury found for the plaintiffs, the sellers of the goods: the Court afterwards refused to grant a new trial, which was moved for, on the ground (among others) that the property in the goods had passed from the plaintiff to the consignee; but Mr. Justice *Park* said (*b*): "The objection which has been now raised, as to the plaintiff's not being entitled to recover in this action, on the ground that the property in the goods had passed to the consignee, was not taken at the trial; nor does it appear to apply to the present case, which is bottomed in fraud, and in which there has been no sale." And Mr. Justice *Richardson* said (*c*): "The action was most properly brought by the plaintiffs, as they had a property in the goods of which they

(*a*) 6 B. Moore, 469; *S. C.* 3 Brod. & Bing. 177.

(*b*) 6 B. Moore, 477.

(*c*) Id. 478.

had been deprived by a gross fraud." Here, the proper and direct course, for the defendant *Waterhouse* to have pursued, would have been to have sent back the box to *Birmingham*, from whence it came; and although the goods it contained might ultimately have come to the hands of the party who ordered them, yet the plaintiff was in law never divested of them, they having been obtained by fraud: and there was no evidence to identify *West*, who received the box at *St. Alban's*, as being the same person who ordered the goods at *Birmingham* in the first instance.

Mr. Serjeant *Wilde*, and Mr. Serjeant *Adams*, in support of the rule.—It appeared in evidence, at the trial, that a person calling himself *J. West*, wrote a letter, addressed to the defendants' coach-office, in *London*, stating, that a parcel sent from *Birmingham*, had been directed, by mistake, to him, at No. 27, *Great Winchester Street*, *London*, but which ought to have been directed to him, at *St. Alban's*, and desiring that it might be forwarded to him there. He, therefore, claimed to be the proprietor of the parcel, and entitled to receive it; and on the arrival of the box at *St. Alban's*, he not only said that it was his, but professed to have a knowledge of its contents; and he stated that there was money in it, which he took out, and, with a part of it, paid his bill at the Inn. The object of that evidence was, to shew that the box came to the possession of the right person, and Lord *Tenterden* was satisfied as to that fact. When the box arrived at the defendants' office, in *London*, they had no means of knowing from whom it came. They could not tell whether it did not come from *West* himself, and there was no evidence to shew that they could have any knowledge that it was sent by the plaintiff. They could not, therefore, have written to him, to inform him that *West* did not reside where it was directed. The delivery of goods to a carrier addressed to the consignee, is a delivery to him as the agent of the consignee. If, therefore, when the defendants

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received the box in question, at *Birmingham*, to be conveyed to *London*, it became the property of *West*, the plaintiff could have no title to it, and consequently the declaration cannot be supported. The *first* count states, that the plaintiff caused the box to be delivered to the defendants, and that they accepted and received it from him, to be safely carried and conveyed by them from *Birmingham* to *London*, and there to be safely and securely delivered *for the plaintiff*; and the *second* states, that the plaintiff caused to be delivered to the defendants, and that they accepted and received from him, a certain other box, to be safely and securely kept by the defendants, *for the plaintiff*, and to be re-delivered by the defendants, on demand, *to the plaintiff*. But did the defendants receive the box, as the agents of the plaintiff, or of *West*? It is clear, that, by the delivery of the box, at *Birmingham*, to the defendants, to carry it to *West* in *London*, the delivery to the consignee was complete. But both the special counts set out a contract between the plaintiff and the defendants; whereas, in fact, the contract was between the defendants and *West*. This objection was raised at the trial, but was met by Lord *Tenterden's* saying, "there is a count in trover." If, in point of fact and of law, the goods were delivered to the defendants for a specific purpose, *viz.* to be conveyed to the person to whom they were addressed, could the contract be considered ambulatory, changing from party to party at the will of the consignor? If a carrier receive a parcel, and be not able to find the party to whom it is addressed, he may keep it in his warehouse, rather than return it to the place from whence it came, in expectation that the party may apply for it; and if the defendants had returned the box to *Birmingham* immediately, they might have been justly said to have acted improperly, as they did not know from whom it came; and it remained in their office in town a full week before any application was made for it on the part of *West*. He bought the goods of the plaintiff, in the regular way of

trade, and gave a bill for them; and two months afterwards, when the bill became due, and the plaintiff could not find either the drawer or the acceptors, he wrote to one of the defendants, to make enquiry after the box: *West* was only an indorsee, and there was no evidence to shew, that, if the bill were fraudulent in its inception, he knew it to be so. Besides, it further appeared, that it had been indorsed by the Royal Bank of *Scotland*, and if the plaintiff had applied there, it might have been honoured in due course; and he procured it to be discounted, before the goods were forwarded to *London*, whereby the property in them passed wholly to *West*, and the bill was not payable till two months from that period. In *Duff* v. *Budd*, the carrier parted with the possession of the goods to a wholly different person than him to whom the consignor intended they should go, and the party obtained possession of them by a fraud. Here, however, no fraud was proved, either in the concoction of, or indorsements on, the bill, as affecting *West*.—As to the count in trover, it is quite clear, that trover is not maintainable under the circumstances. The plaintiff delivered the box containing the goods in question to the defendants, to be conveyed to *West*, the consignee, from whom he had received the price, and if it had been lost, or the defendants had been guilty of any misfeasance, *West* would have had his remedy against them, the plaintiff having no property in the goods, to enable him to maintain an action. Although in *Noble* v. *Adams* (*a*), it was held, that the obtaining goods on false pretences, under colour of purchasing them, did not change the property; yet there, there was abundant ground to suspect a fraud, of which the plaintiff was cognizant: and in *Foster* v. *Frampton* (*b*), it was held, that if the consignee get possession of goods, before they arrive at the place of their destination, the *transitus* is at an end. So, here, if *West*, the consignee, had demanded the

(*a*) 7 Taunt. 59. (*b*) 6 Barn. & Cres. 107.

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goods, the defendants could not have refused to deliver them to him.

The Court being inclined to think that neither of the special counts could be supported, requested Mr. Serjeant *Bosanquet* to consider, whether, under the circumstances, the plaintiff was entitled to recover on the count in trover.—To maintain trover, two things are requisite: —*first*, a title to the property in the plaintiff, and, *secondly*, a conversion by the defendant. The question then is, *First*, was the box the property of the plaintiff? If goods be obtained by one man from another, by felony, fraud, or swindling, the party intending fraud at the time, no property passes, according to the case of *Noble* v. *Adams*. So, in The Earl of *Bristol* v. *Wilsmore* (*a*), where, by a contract of sale, the property sold was to be paid for in ready money, and the vendee induced the servant of the vendor to deliver it for a check upon a banker, which he represented to be as good as money; but which, when presented, was refused payment, he having overdrawn his account for many months; and, on the same day that the goods were purchased, the vendee gave a warrant of attorney to a creditor, on which judgment was immediately entered up and execution issued, and the property in question seized by the bailiff of a liberty, and afterwards rescued by the vendor:—it was held, in an action by the bailiff for the rescue, that the question, whether the contract of sale was so vitiated by fraud, as to prevent the property in the goods passing to the vendee, depended upon a question of fact, which ought to have been submitted to the Jury, *viz.* whether the vendee had obtained possession of the goods with a *preconceived* design of not paying for them. In *Rex* v. *Jackson* (*b*), it was held to be an indictable offence, fraudulently to obtain goods by giving in payment a check upon a banker with whom

(*a*) 1 Barn. & Cres. 514; *S. C.* 2 Dow. & Ryl. 755. (*b*) 3 Campb. 370.

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the party kept no cash, and which he knew would not be paid. In *Duff* v. *Budd*, Mr. Justice *Richardson* said (*a*): "The action was most properly brought by the plaintiffs, as they had a property in the goods of which they had been deprived by a gross fraud." On the part of the defendants, it has been attempted to distinguish this case from *Duff* v. *Budd*, because the bill given to the plaintiff by *West*, in payment for the goods, was payable at a future day; and it has been contended, that, as the goods were delivered to *West*, the property in them could not revert to the original possessor, until something had been done by *West* to repudiate the contract. This, however, is a fallacy; for, if it were a swindling transaction, the property was never divested out of the plaintiff. There can be no doubt, but that the whole affair was fraudulent in its inception. There was no payment by *West*. He gave a mere piece of waste paper; for the bill proved to be nothing more; and *West* knew it was of no value at the time he gave it; therefore, no property in the goods could pass to him; and, consequently, when the plaintiff sent the goods to the coach-office they were *his* goods. The question of fraud was not left to the Jury, as Lord *Tenterden* had no doubt but that it was a swindling transaction, and that *West* had obtained the goods from the plaintiff by fraud.—*Secondly*, as to whether there has been any conversion by the defendants, it must be admitted, that trover does not lie for negligence, or non-feazance, or for a mere omission; but it is clear, that it does lie for a misfeazance, or an injurious act done to the property of another. If a person, having the goods of another, dispose of them wrongfully, although with the best intention, or by mistake, trover may be maintained, and ignorance or a *bonâ fide* intent will form no ground of excuse. In an *Anonymous* case (*b*), it was held, that trover does not lie against a carrier for negligence, as, for *losing* a box; but that it does for an actual wrong. In *Perkins* v. *Smith* (*c*),

(*a*) 6 B. Moore, 478. (*b*) 2 Salk. 655. (*c*) 1 Wils. 328.

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it was decided, that trover lies against a servant who disposes of goods, the property of another, to his master's use, whether he have any authority from his master for so doing, or not; and on its being there objected that the action was improperly brought against the servant who acted wholly for his master, Lord Chief Justice *Lee* said: "The gist of trover is, the detainer or disposal of goods which are the property of another, wrongfully; and it is found, that the defendant himself disposed of them to his master's use, which his master could give him no authority to do; and this is a conversion in the defendant; this disposal being his own tortious act." In *Ross* v. *Johnson* (*a*), it was held, that if goods be *lost or stolen* from a wharfinger or carrier, an action of trover will not lie, the proper remedy being an action on the case; and Lord *Mansfield* there said: "In order to maintain trover, there must be an injurious conversion. This is not to be esteemed a refusal to deliver the goods, the defendants cannot deliver them, it is not in their power to do it. It is a bare omission." And Mr. Justice *Aston* agreed, and cited the case of *Owen* v. *Lewyn* (*b*), where Lord Chief Justice *Hale* said: "If a carrier loseth goods committed to him, a general action of trover doth not lie against him." In *Youl* v. *Harbottle* (*c*), it was held, that if a carrier have goods to carry, and *by mistake* deliver them to a wrong person, this is such a tortious conversion as will support an action of *trover* at the suit of the right owner; and Lord *Kenyon* said: "I agree, that when a carrier loses goods by accident, trover will not lie against him, but when he delivers them to a third person, and is an actor, though under a mistake, this species of action may be maintained." In *Samuel* v. *Darch* (*d*), the plaintiff declared in *assumpsit* against the defendants, who were carriers, for not delivering goods pursuant to their undertaking. The goods, it appeared, were delivered by mistake to a wrong person;

(*a*) 5 Bur. 2825.
(*b*) 1 Vent. 223.
(*c*) Peake's Ni. Pri. Cas. 3d. Edit. 68.
(*d*) 2 Stark. Rep. 60.

and Lord *Ellenborough* said: "If the declaration had been in *trover*, the plaintiff would have been entitled to recover, since the delivery of the goods to another amounted to a conversion." In *Devereux* v. *Barclay* (*a*), it was held, that trover would lie for the mis-delivery of goods by a warehouse-man, although such mis-delivery had occurred by mistake only; and Lord Chief Justice *Abbott* said: "There is a great distinction between an omission and an act done. In the case cited from *Burrow* (*b*), no act was done; and Lord *Mansfield* expressly said, that it was a mere omission. But here, there is an act done by the defendants, which, in its consequences, is injurious to the plaintiff. Upon this evidence, therefore, I am now of opinion, that trover may be maintained." In *Stephens* v. *Elwall* (*c*), it was held, that a servant may be charged in trover, although the act of conversion be done by him for the benefit of his master; and Lord *Ellenborough* there said: "A person is guilty of a conversion, who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another, who had himself no authority to dispose of it." That principle applies expressly to this case; and, at the trial, it was left most properly to the Jury to say, whether or not the goods were delivered in the ordinary course, and according to the duty of the defendants as carriers; and they found, that they were not. If even *West*, to whom they were delivered, were the right person, the case is not varied; for the property in the goods was still in the plaintiff. He directed the box to be delivered at No. 27, *Great Winchester Street;* and this direction was not complied with. If a custom had been proved, that, in cases of this description, where a party, to whom a parcel is directed, is not to be found at the particular place to which it is directed, it may be sent elsewhere, to any person demanding it, it might have af-

(*a*) 2 Barn. & Ald. 702. (*b*) *Ross* v. *Johnson*, 5 Burr. 2825.
(*c*) 4 Mau. & Selw. 259.

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forded an answer to this action; but the Jury have, by their verdict, expresaly negatived any such custom or practice, and found that the box was not delivered in the ordinary course. If a carrier discover that an address of a box, or parcel, to a party at a particular residence, is fictitious, he is not bound to deliver it elsewhere. The doctrine of *stoppage in transitu* is altogether beside the present question. The true rule, however, in a case of that description, was laid down in *Holst* v. *Pownal* (*a*), *viz.* that possession obtained by the consignee before the completion of the voyage, will not divest the right of the consignor to stop the goods; and that a claim made by the consignor upon a carrier, is sufficient, without actual possession. Here, however, the plaintiff was never divested of his right or property in the goods, as they were obtained from him by *West* through fraud and contrivance.

Mr. Justice PARK.—I am of opinion, that there ought not to be a new trial. This case has been fully argued and considered; and the main question is, whether Lord *Tenterden* did not virtually leave all that was necessary to the Jury. I am strongly inclined to think, that neither of the special counts can be supported by the evidence adduced at the trial. But, on this point, I give no opinion, as I have no doubt but that the count in trover may be maintained. This appears to me to be established by the case of *Ross* v. *Johnson*, where it was held, that trover would not lie against a common carrier for goods *stolen or lost* in the course of their conveyance, as that amounts to a mere negligence; but Lord *Mansfield* there took the distinction, and said, that, in order to maintain trover, there must be an injurious conversion; that the defendants in that case could not deliver the goods; that it was not in their power to do it: and that it was a bare omission. And Mr. Justice *Aston* agreed, that there being a bare omission, and

(*a*) 1 Esp. Rep. 240.

no evidence of a conversion, trover would not lie, but that the clear remedy was by action upon the case; and in *Youl* v. *Harbottle*, Lord *Kenyon*, referring to the principle laid down in that case, said, "I agree, that when a carrier loses goods by accident, trover will not lie against him; but when he delivers them to a third person, and is an actor, though under a mistake, this species of action may be maintained. There, the carrier delivered goods to a wrong person by a mere mistake; and yet it was held, that trover would lie, as the plaintiff had sustained an injury by his positive act. So, in *Devereux* v. *Barclay*, it was held that trover might be maintained for the mis-delivery of goods by a warehouseman, although such mis-delivery were occasioned by mistake; and Lord Chief Justice *Abbott* said: "There is a great distinction between an omission and an act done; and here there is an act done by the defendant, which, in its consequences, is injurious to the plaintiff;" and Mr. Justice *Bayley* referred to *Youl* v. *Harbottle*, as confirming the principle, that a carrier is liable in trover for a mis-delivery.—That is no new doctrine. It was first established in an *Anonymous* case in *Salkeld*, where Lord Chief Justice *Trevor* and the Court held, that trover does not lie against a carrier for negligence, as for losing a box; but that it does for an actual wrong. The question, then, in this case is, whether the defendants, as carriers, have or have not been guilty of a wrong whereby the plaintiff has sustained an injury. He had sold goods, in my opinion, to a felon, and not to a mere swindler, as he received a fictitious bill in payment. It is true, the plaintiff meant to sell the goods; but did *West* intend to buy them? There can be no doubt that he did not, as his object was to obtain them by fraud. In the case of *James Campbell*, who was lately tried at the *Old Bailey* before the Common Serjeant, it appeared that the prisoner went into a shop in the city, and purchased jewellery and trinkets to the amount of 10*l.*; that he was

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a stranger to the person who kept the shop, and said that he would pay in cash, and the seller agreed to deliver the goods at the coach-office at *Lad Lane*, the prisoner stating that he lodged at the inn there. The goods were accordingly taken, when the prisoner said he had been disappointed in receiving some money he expected by letter. A two-penny post letter was just afterwards put into his hand, which he opened in the presence of the seller of the goods, and said, that he had to meet a friend at *Tom's Coffee-house* at seven in the evening, who would supply him with the money. The box containing the jewellery was accordingly left at the coach-office, and the seller went home. It also appeared, that the prisoner had ordered a place to be reserved for him in the *Birmingham* mail, which he countermanded, and absconded with the box. Under these circumstances, the Common Serjeant left it to the Jury to consider, whether it was the prisoner's intention to purchase the goods. They thought that it was not, and accordingly found him guilty: and a case was reserved for the opinion of the twelve Judges, which was considered in the *Exchequer Chamber* in the course of this Term, when we were all of opinion that the prisoner had been guilty of an act of felony, as the vendor's property in the goods had never changed. So here, there can be no doubt but that *West* was a swindler, as he not only gave a false bill of exchange in payment for the goods, but also a fictitious address and description; and although it has been said, that the question of fraud was not left to the Jury, yet, in point of fact, it was, as my Lord *Tenterden* expressed an opinion, in the course of the trial, that it was a swindling transaction; and therefore it was not necessary for him to leave it to them in summing up; but he expressly left it to them to say, whether the defendants had delivered the box or not according to the ordinary course of business and their duty as carriers. This appears to me to involve the question of fraud. It is clear the box was not delivered in due course;

the property it contained was still vested in the plaintiff, the box having been directed to *West*, at No. 27, *Great Winchester Street*, and on enquiry by the defendants' servants, it was ascertained that no such person resided there. It appears, too, that when the plaintiff made enquiry for the box at the defendants' office in *London*, he was told, that it had been sent back to *Birmingham*. That was not true; and although it might have been placed in the office from which goods are conveyed from *London* to *Birmingham*, the plaintiff could not be aware of it. It has been mainly contended, however, that it was ultimately delivered to the right person. But *West* was a felon; and if so, the plaintiff's property in the goods had never changed; and can it be said for a moment, that a carrier does his duty by sending a box to a person at *St. Alban's*, of whom he knows nothing, when it was directed to be delivered to a person of the same name in *Great Winchester Street, London*. It has been further urged, that it was impossible for the defendants to know who the original seller was, or who sent the box to their office at *Birmingham;* but they should have sent it back there; and they were not justified in forwarding it to *St. Alban's;*—if they were, our decision in the case of *Duff* v. *Budd* was wrong, where we held, that a carrier is bound to deliver a parcel at the place to which it is directed. There, a swindler went to a shop or warehouse in *London*, and ordered goods to be directed *to James Parker, High Street, Oxford*, who was well known there, and the goods were accordingly sent to *Oxford* by the defendant, a carrier; and, on their arrival, his porter called on Mr. *Parker* with the parcel, and, on his saying that he did not expect any parcel, it was taken back to the office; and on the following morning a person came there, who had before received two parcels, which were directed for "Mr. *Parker*, to be left at the office till called for," and took away the parcel in question; and Lord Chief Justice *Dallas*, who tried the cause, was of

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opinion, that the carrier was liable, and observed to the Jury, that, if the defendant or his servants had not taken the same care of the parcel as a prudent man would have taken of his own, he had been guilty of gross negligence; and the Jury accordingly found a verdict for the plaintiffs. There no imputation was cast on the defendant as a carrier; and after an ingenious and able argument by my brother *Pell* for a new trial, the Court refused it, on the ground (among others) that the plaintiff's property in the goods had not passed to the consignee, but remained in the original owner, they having been obtained from him through a swindling act; and Mr. Justice *Richardson* is reported to have said, and on which I rely (*a*): "The action was most properly brought by the plaintiffs, as they had a property in the goods, of which they had been deprived by a gross fraud. I also think that the defendant has been guilty of gross negligence, as the parcel was not delivered as directed." The only doubt I have entertained in this case was, whether the box was not delivered to the right person; but, as he must be considered as a felon, the plaintiff's property in the goods still remained, and was not changed by the delivery of them to the defendants. It has been also said, that *West* might have brought an action against the defendants, if he had demanded the box, and they had refused to deliver it up to him. To this I cannot accede, for the reasons above stated, coupled with all the circumstances which have been now brought before us; and although it has been said, that the plaintiff could maintain no action till the bill of exchange became due, as he took it in payment for the goods, and appropriated it to his own use by getting it discounted; yet the defendants should not have parted with the box, when they found that no person of the name of *West* resided at No. 27, *Great Winchester Street*, where it was directed, or in any of the adjoining houses.

(*a*) 6 B. Moore, 478.

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Mr. Justice BURROUGH.—I am of opinion, that the verdict found by the Jury is a right verdict.—Lord *Tenterden* did not decide, whether the action was maintainable or not on the special counts of the declaration; but merely said, that there was a count in trover; but I am strongly inclined to think, that the second count may be supported. It is founded on the original contract between the plaintiff, as the consignor of the box, and the defendants as carriers, and states, that the plaintiff caused it to be delivered to them, and that they accepted and received it from him, to be safely kept by the defendants for the plaintiff, and to be re-delivered by them, on demand to him. The defendants were directed to deliver the box at No. 27, *Great Winchester Street;* and on its being taken there, according to the direction, the defendants' porter found that the house was untenanted, and that no such person as *West* ever lived there, nor was there any person of that name in the street. The defendants had performed their contract when they took the box to the house to which it was directed, and it afterwards remained in their hands as the property of the sender. A new contract then arose between the plaintiff (the consignor) and the defendants, as carriers, and they ought to have taken care of the box for him. It appears that it was taken back to their office in *Lad Lane*, and if an action had been brought against them by *West*, the consignee, for not delivering it, it would have been a sufficient answer for them to say, that they had taken it to the house where it was directed; that no such person as *West* resided there; and that they then held it in their custody for the party who sent it from *Birmingham*. There can be no doubt but that the goods were obtained from the plaintiff, by *West*, through a gross fraud. He bargained for them, and not only gave a bill of exchange in payment, (the drawer and acceptors of which were fictitious persons), but directed the box to be sent to a particular house in *London*, where he never resided, and which was found to be uninhabited when the

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defendants' porter took the box. That circumstance should have awakened the suspicion of the defendants, and they should have enquired into the nature of the transaction, and sent to *Birmingham* to endeavour to ascertain who had sent the box; and as they did not do so, but delivered it at *St. Alban's*, it appears to me that they acted inconsistently with their duty as carriers, and with their contract with the plaintiff, as the sender of the box.—Without, however, determining whether the action can be maintained on the second count of the declaration, I am clearly of opinion, that the plaintiff is, at all events, entitled to recover on the count in trover.

Mr. Justice GASELEE.—I am of opinion, that under all the circumstances, the defendants have conducted themselves with gross negligence. It was their duty, when they found that no such person as *West* lived at No. 27, *Great Winchester Street*, not to have delivered the box at *St. Alban's*, without first enquiring whether or not *West* was the proper person to receive it. If a carrier, through negligence, cause a box or parcel to be delivered to a wrong person, there is no doubt but that trover will lie. But I am clearly of opinion, that this action cannot be maintained on the first count of the declaration; and, in the second, the original contract is stated as being made between the vendor, or consignor of the box, and the carriers, whilst, according to the case of *Dawes* v. *Peck*, the delivery by the former to the latter passed the property in the goods to the consignee. To this it has been answered, that *West*, the purchaser, had no such property, as the goods were obtained by him from the plaintiff through fraud; but at and from the time of the delivery of the box to the defendants, to the receipt of the letter from *West*, they did not know who sent the box, or to whom it belonged. If *West* had lived at No. 26, *Great Winchester Street*, instead of 27, would the defendants have acted improperly in delivering the box to him there? I

think not; and consequently that the action cannot be maintained on the second count. With respect to the count in trover, I have had considerable doubts on two points; *First*, whether it ought not to have been left to, and found by, the Jury, that the goods were obtained by *West* by fraud or swindling. It was, in fact, put to them, as Lord *Tenterden*, in the course of the trial, said, that he had no doubt of it; and if the cause were to go down again, there can be little doubt as to its result. *Secondly*, If, in point of fact, the goods were delivered to the person who ordered them, and (until the bill of exchange given in payment for them became due) *West* must be considered as the proper person to receive the goods, have the defendants, by the delivery of the box to him, been guilty of such a wrongful act, or misconduct, as to make them guilty of a conversion? There can be no doubt but that the owner may maintain trover against a carrier, who has, by mistake, delivered goods entrusted to him to a wrong person; but in *Attersol* v. *Briant* (*a*), which was an action of trover for bricks, and the plaintiff proved, that they had been sent to the defendant to be conveyed by him, as a carrier, and delivered to *J. S.*, and that he had told the plaintiff, that he had delivered them to *J. S.*, when, in fact, he had not done so, and that they had never reached his hands; Lord *Ellenborough* said, that the facts stated were not sufficient evidence of a conversion to support an action of trover; that although the defendant might have been guilty of a tort respecting the bricks, it did not appear that he was guilty of the specific tort mentioned in the declaration; and that the action, therefore, was misconceived. So here, I entertain considerable doubt, whether the defendants can be said to have committed a specific or particular tort, *viz.* the conversion of the goods, as stated in the declaration. This will mainly depend on the question, whether *West* was

(*a*) 1 Camp. 409.

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the person entitled to have the box delivered to him; and it appears to me, from the whole of the facts, that he was. He was, no doubt, the party who ordered the goods, and desired them to be directed to him in *London*. That was a question for the Jury, *viz.* whether they were delivered to the right person; but Lord *Tenterden* merely left it to them, whether the box had been delivered in due course, without even suggesting, whether it had been delivered to the right person or not. At all events, the defendants can only have a new trial on payment of costs, and then the plaintiff might shape his case differently, and amend the record. But, as justice appears to have been done, and the Court think that the verdict may be supported, my opinion is of little weight; and more particularly so, as the defendants have certainly conducted themselves with negligence, as they not only could not find the party at the house to which the box was directed, but afterwards caused it to be delivered to a person at an inn, at *St. Alban's* (which was a vague description), where *West* did not reside.

Rule discharged.

Tuesday, Feb. 12*th.*

TUCKER and Others, Assignees of J. A. GILBERT, a Bankrupt *v.* HUMPHERY.

Goods were shipped on the 5th *April*, 1824, by *W. & Co.*, for one *Gilbert*, on board a vessel, addressed to the defendant's wharf. An invoice of the goods was sent to *Gilbert*, stating them to be bought and shipped for him and on his account and risk, and in the ship's manifest they were marked to be delivered "to order." The vessel arrived at the wharf, on the 12th, but the goods were not landed. On the 10th, *Gilbert* committed an act of bankruptcy, whereupon a commission was issued against him on the 14th. On the 17th the goods were claimed by a person on behalf of the consignors; and on the 19th, the messenger under the commission produced the invoice that had been sent to *Gilbert*, and demanded the goods. The defendant delivered them to the consignors' agent; and the assignees sued him in *trover*:—Held, that the *transitus* was not at an end, and that the consignors of the goods had a right to stop them.

THIS was an action of trover, brought by the plaintiffs, as assignees of one *John Anthony Gilbert*, a bankrupt, for the recovery of a quantity of flour, alleged to belong to the latter.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings in the last Term, the cause was referred to arbitration, by an order of his Lordship (which order was afterwards made a rule of Court). On the 9th *January*, 1828, the arbitrator made his award, whereby, after reciting the order of reference, by which all matters in difference between the parties were referred; and that the action was brought by the plaintiffs, as assignees, to recover from the defendant the value of three several parcels of flour, one consisting of one hundred and twenty-five sacks, another of fifty sacks, and the third, of twenty-five sacks, alleged by the plaintiffs to have belonged to *John Anthony Gilbert*, before he became bankrupt; he found and awarded, that the plaintiffs were entitled to recover against the defendant, the value of the said parcel of flour firstly above mentioned (consisting of one hundred and twenty-five sacks), amounting to the sum of *262l.* 10*s.*; that the plaintiffs were not entitled to recover against the defendant the value of the said parcel of flour secondly above mentioned (consisting of fifty sacks), or any part thereof. And *lastly*, he found and awarded that the plaintiffs were entitled to recover against the defendant the value of the said parcel of flour lastly above mentioned (consisting of twenty-five sacks), amounting to the sum of *52l.* 10*s.* But as to this last-mentioned parcel of flour, consisting of twenty-five sacks, and of the value of *52l.* 10*s.*, as above mentioned, the arbitrator, at the instance, and with the consent, of the parties, stated the following facts, proved before him on the reference, in order that the defendant might take the opinion of this Court thereon, if he should think fit, that is to say:—

"The 25 sacks in question were purchased by Messrs. *Wilkinson & Co.*, of *Stockton*, for the said *John Anthony Gilbert*, with their own money; they charged no profit upon them, but merely charged a commission of 1*s. per* sack, for pur-

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chasing them, and they shipped them, together with the remainder of a cargo of other goods, by a vessel, named the *Cumberland*, bound for *London*. This vessel was addressed by Messrs. *Wilkinson & Co.* to the defendant's wharf, and they sent to the defendant by post a manifest of the cargo. They sent also to *Gilbert* an invoice of these twenty-five sacks of flour, stating them to be bought and shipped for him, and on his account and risk. When a ship was thus addressed by Messrs. *Wilkinson & Co.* to the defendant's wharf, they always sent a manifest of the cargo to the defendant by post; and, in this manifest, the different items of the cargo, and their marks, were inserted, and opposite to each item, either the name of the consignee, or the words "to order," were written. When such vessel arrived at the wharf, those goods to which the consignee's name was annexed, in the manifest, were delivered to such consignee, or his order, upon application; and those to which the words "to order" were opposite in the manifest, were delivered to the order of *Wilkinson & Co.*, that is to say, to persons producing either bills of lading for the goods, or *Wilkinson & Co.'s* invoices of them respectively. Flour thus appearing to be shipped "to order," by the manifest, was always left on board the vessel, and not landed until such bill of lading or invoice was produced; but if no such bill of lading or invoice were produced by the time the vessel began to take in her return cargo, then the flour was landed and placed in the defendant's warehouses, and there kept to the order of the shippers. *Gilbert*, the bankrupt, was in the habit of having flour shipped for him, from *Stockton*, which came to the defendant's wharf; and he always, in such cases, either sold it on board before it was landed, or it was landed, and kept for him in the defendant's warehouses until he sold it; so that the defendant's wharf was always deemed the place of its destination.

The twenty-five sacks of flour in question were shipped on board the *Cumberland*, on the 5th *April*, 1824, and arrived at the wharf on the 12th, but were not *landed* until between the 22nd and 26th of the same month. On the 17th day of that month, an order from *Wilkinson & Co.*, directed to the defendant, requiring him to deliver these twenty-five sacks of flour to Messrs. *Atkinson & Cramp*, was produced to the defendant by Mr. *Cramp*, and the flour was then claimed by Mr. *Cramp* on the part of *Wilkinson & Co.* *Gilbert* at that time was a bankrupt. He had committed an act of bankruptcy on the 10th *April*, 1824. On the 14th, a commission of bankrupt was thereupon issued against him; and on the 19th day of the same month, the messenger under that commission produced to the defendant the invoice of the twenty-five sacks of flour in question, which had been sent by *Wilkinson & Co.* to *Gilbert*, as before mentioned, and demanded the flour, which was refused to him. Messrs. *Atkinson & Cramp* afterwards landed the flour, and sold it for the account of *Wilkinson & Co.* The parties to this action having consented that, in case this Court should be of opinion, that, under the circumstances herein-before stated, the plaintiffs were not entitled to recover for the value of the said last-mentioned parcel of flour, consisting of twenty-five sacks as aforesaid; then, and in such case, the arbitrator's award, in favour of the plaintiffs, for the value of the said first and last parcels of flour above mentioned, amounting to the sum of 315*l.*, should be reduced by the amount of the value of the said last-mentioned parcel, that is to say, by the sum of 52*l.* 10*s.* aforesaid."

Mr. Serjeant *Wilde*, on a former day in this Term, accordingly moved, that the sum of 315*l.* mentioned in the award, might be reduced by the sum of 52*l.* 10*s.*, the value of the last parcel of flour, consisting of twenty-five sacks,

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as mentioned in the award, when the Court ordered it to be set down for argument as a special case.

Mr. Serjeant *E. Lawes*, for the plaintiffs.—The arbitrator has found, that the vessel containing the flour in question was addressed by Messrs. *Wilkinson & Co.*, the consignors, to the defendant's wharf; and that an invoice was sent by them to the bankrupt, *Gilbert*, stating that they had bought and shipped the flour for him, and on his account and risk. He has also found, that the defendant's wharf was the place of its destination; that the flour arrived there on the 12th *April*, 1824; that no demand was made until the 17th, when the defendant received an order from *Wilkinson & Co.*, requiring him to deliver the flour to Messrs. *Atkinson & Cramp;* and that, on the 19th, the messenger under the commission against *Gilbert* produced the invoice, which was in the usual form, and demanded the flour, which the defendant refused to deliver to him. It is clear, that the flour had arrived at the place of its destination, and yet the consignors claim a right to stop it *in transitu*. Although, in *Loeschman* v. *Williams* (*a*), it was held, that goods delivered to the packer of the purchaser (he having no warehouse of his own), with an intimation to the packer that they were to be paid for on delivery, might be stopped *in transitu;* yet, that was on the ground that the goods might be countermanded; that the delivery was only conditional; and that the packer was to be considered as a trustee for the vendor: whereas, here, there was no condition, but an absolute and unqualified delivery by the consignors to the defendant, for *Gilbert*, the bankrupt. Where the purchaser of goods uses the wharf or warehouse of a third person as his own, the delivery of them there is equivalent to a delivery to himself; and the goods would be as much in his possession and under his

(*a*) 4 Campb. 181.

control whilst on the wharf or in the warehouse, as if they were in his manual custody. The first case in which this doctrine seems to have been established, is that of *Richardson* v. *Goss*, where Mr. Justice *Chambre* said (*a*): "I should strongly incline to think, that, if a man be in the habit of using the warehouse of a wharfinger as his own, and make that the repository of his goods, and dispose of them there, the journey would be at an end when the goods arrived at such warehouse;" and Lord *Alvanley* expressed his concurrence with that opinion in *Scott* v. *Pettit* (*b*). It is true, that, here, the flour was not landed; but it is perfectly immaterial whether it remained on board the ship, or was landed on the wharf, or lodged in the defendant's warehouses. As far as regards the consignment, the flour had arrived at the place of its ultimate destination; particularly as it is found as a fact, that *Gilbert* had been in the habit of leaving it on board till sold. The ship, therefore, must be considered as much his warehouse as the wharf. In *Scott* v. *Pettit*, goods were, on the 16th *March*, forwarded from *Manchester*, addressed to *A.*, at the *Bull and Mouth* Inn, *London*, in consequence of a previous order from him. On the 23d of the same month, they were sent to the house of the defendant, who was the packer of *A.*, in pursuance of a general order, that all goods addressed to him should be sent there, *A.* having no warehouse of his own; but as to these particular goods, no direction was given. On the 11th of *March*, *A.* committed an act of bankruptcy. When the goods arrived at the defendant's, they were booked to the account of *A.*, and the defendant, not knowing of *A.'s* bankruptcy, unpacked the goods to ascertain the contents. On the 31st *March*, the goods were claimed by the consignors, and, on the day after, by the assignees of *A.*, against whom a commission had issued:—and it was held, that the *transitus* of the goods was at an end when they arrived at the defend-

(*a*) 3 Bos. & Pul. 127. (*b*) 3 Bos. & Pul. 472.

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ant's house, and, consequently, that the plaintiffs, as the assignees of *A.*, were entitled to recover them in an action of trover; and Mr. Justice *Chambre* there said (*a*): "However hard the law may, in general, be thought, which vests the property in goods, which arrive after an act of bankruptcy, in the assignees of the bankrupt, it would be still more hard, in the present instance, if the creditors were not permitted to resort to the property in the hands of the defendant, since he could have no stock in his own possession. The creditors of a trader generally know whether he has goods in his possession, and trust him accordingly; and the creditors of this bankrupt probably knew that he considered the warehouse of his packer as his own, and that the goods were consigned to him there. In those cases, where the *transitus* of the goods has not been considered as at an end, the goods have only remained with the packer for the purpose of being forwarded to some ulterior destination. In this case, there was no ulterior destination, the *transitus* was at an end." So here, the flour had arrived at its ultimate destination. The case of *Mills* v. *Ball* (*b*), and others of a like nature, are distinguishable from the present, as a delivery to a carrier, or wharfinger, may be rescindable before it is completed, and he may be considered as a middle man. In *Rowe* v. *Pickford* (*c*), a trader in *London* was in the habit of purchasing goods at *Manchester*, and exporting them to the continent shortly after their arrival in *London*. The goods consigned to him, remained in the waggon-office of the defendants, who were carriers, until they were removed by his agent for the purpose of being shipped:—it was held, that such trader having become bankrupt, his assignees were entitled to recover goods deposited with the defendants before the bankruptcy, and that the consignor had no right to stop

(*a*) 3 Bos. & Pul. 473. (*b*) 2 Bos. & Pul. 457.
(*c*) 1 B. Moore, 526; *S. C.* 6 Taunt. 83.

them *in transitu;* and that, as the trader had no warehouse of his own, the *transitus* of the goods was at an end on their arrival at the waggon-office; and the Court said, that the case must be governed by those of *Leeds* v. *Wright* (*a*), and *Scott* v. *Pettit* (*b*), in the latter of which it was held that where a trader had no warehouse of his own, but used that of his packer, for receiving goods consigned to him, the *transitus* of such goods was at an end upon the delivery of them to the packer. In the late case of *Foster* v. *Frampton* (*c*), the vendee of several hogsheads of sugar, upon receiving from a carrier notice of their arrival, took samples from them, and for his own convenience desired the carrier to let them remain in his warehouse until he should receive further directions, and, before they were removed, became bankrupt; it was held, that the *transitus* was at an end; and that the vendor was not entitled to stop them; and Mr. Justice *Bayley* there said: "Where a man orders goods to be delivered at a particular place, the *transitus* continues until they are delivered to the consignee at that place; but that must be understood of a delivery in the ordinary course of business; for, if the consignee, before the goods reach their ultimate destination, postpone the delivery, or do any act which is equivalent to taking actual possession of them, the *transitus* is at an end." So here, the wharf of the defendant was, in the ordinary course of business between the parties, the place of ultimate destination for flour shipped to the bankrupt by *Wilkinson & Co.;* and the *transitus* was at an end, although the flour in question remained in the hold of the vessel; as it is found as a fact, that the bankrupt was in the habit of selling flour on board before it was landed; and if so, the ship might be considered as the warehouse for this particular purpose, and the arbitrator so appears to have considered it, and

(*a*) 3 Bos. & Pul. 320. (*b*) Id. 469.
(*c*) 6 Barn. & Cres. 107.

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there is consequently no ground for reducing the sum of 315*l.*, to which he thought the plaintiffs were entitled.

Mr. Serjeant *Wilde*, *contrà*.—From the facts found by the arbitrator, it appears, that when the flour in question arrived at the defendant's wharf, it was not received by him on account of *Gilbert*, the bankrupt, or of any particular individual; for when a ship was addressed by *Wilkinson & Co.*, the shippers, to the wharf, they always sent the defendant a manifest of the cargo, in which the different items and marks were inserted; and opposite to each item, either the name of the consignee, or the words, "to order," were written; and on the arrival of the vessel, the goods to which the consignee's name was annexed in the manifest, were delivered to him, or his order, on application, whilst those to which the words, "to order," were opposite in the manifest, were delivered to the order of the shippers, that is to say, to persons producing either bills of lading for the goods, or the shippers' invoices of them respectively. The twenty-five sacks in question were marked to be delivered "to order;" therefore they continued *in transitu* until the production of such order, and the consequent delivery. The award distinctly points out when the delivery was to be made in such case, *viz.* "when flour was shipped 'to order,' it was always left on board the vessel, and not landed until a bill of lading, or invoice, was produced." The defendant, as wharfinger, could not, on the arrival, know who was entitled to receive the flour, and the time for landing had not arrived, as, if no bill of lading, or invoice, was produced by the time the vessel began to take in her return cargo, the flour was landed and placed in the defendant's warehouses, and there kept to the order of the shippers; and it is clear, that, until delivery, the shippers had a right to stop. Therefore, whether the flour continued on board the vessel, or was landed on the wharf, or

in the defendant's warehouses, it still remained in the course of its transit from Messrs. *Wilkinson*, the consignors, to *Gilbert*, the consignee; and that transit could only be determined by the production of a bill of lading, or invoice, and a demand of delivery. There is nothing to warrant the supposition, that the transit was at an end on the ship's arrival at the wharf; for the flour remained on board, not for the convenience of the wharfinger, but in the course of its transit from the consignors to the consignee, or until its delivery was claimed by the latter, or the party produced the bill of lading or invoice; and, till such claim, the vessel might be assimilated to a waggon; and here, as the order from the shippers was given to the defendant, to deliver the flour to Messrs. *Atkinson & Cramp*, two days before the invoice was produced by the messenger under the commission against *Gilbert*, Messrs. *Wilkinson & Co.* had a clear right to stop it. This, therefore, is the simple case of a vendor consigning goods; and it is a general principle, that, until they get to the actual possession of the consignee, the right of the consignor to stop *in transitu* exists; and although there may be a constructive delivery, yet there must be some act done by the consignee, amounting to an *actual* delivery, before such right is determined, or at an end. It is true that a delivery to an agent of the consignee is sometimes sufficient. In *Rowe* v. *Pickford*, the warehouse-keeper had been in the habit of receiving goods for the bankrupt, who had no warehouse of his own, and the goods consigned to him remained in the waggon-office until removed by the bankrupt's agent, for the purpose of being shipped; and, in that particular instance, the warehouse-keeper had recognized the title of the consignee, and had sent to inform him of the arrival of the goods; and it also appeared, that a clerk of the bankrupt went to the warehouse and saw them. That, therefore, amounted to a constructive delivery, the goods remaining there, sub-

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ject to the control of the bankrupt, and constituted the relation of principal and agent between him and the warehouse-keeper. In *Foster* v. *Frampton*, a part of the goods was actually delivered to the bankrupt, and the remainder (he having taken samples of them) left with the carrier, who undertook to hold them on account of the bankrupt, and as his agent. Here, however, the flour was sent to the defendant's wharf; and though an invoice of it was sent to *Gilbert*, yet the defendant did not receive it as his agent, and he was not to deliver it until *Gilbert*, or some person for him, produced *Wilkinson & Co.'s* bill of lading, or invoice, and demanded the flour accordingly; and although the invoice, when produced, might have the effect of an order to deliver, yet the defendant could not know that *Gilbert* was entitled to receive the flour, or that he had the invoice; and he was altogether ignorant of his claim, until after he had received the delivery order from Messrs. *Wilkinson*, the consignors. Although, in *Lickbarrow* v. *Mason* (*a*), it was held, that bills of lading are transferrible and negotiable by the custom of merchants, and that, if the consignee assign such bills to a third person for a valuable consideration, the right of the consignor, as against such assignee, is divested; yet it has never been determined, that the delivery of a mere invoice would defeat such right. In *Crawshay* v. *Eades* (*b*), *A.* delivered a quantity of iron to a carrier, to be conveyed by him to *B.*, the vendee, in the country; and the carrier having reached *B.'s* premises, landed a part of the iron on his wharf, and then, finding that *B.* had stopped payment, reloaded the same on board his barge, and took the whole of the iron to his own premises: and it was held, that there was no delivery of any part of the iron, so as to divest the consignor of his right to stop *in transitu*, the special property remaining in the carrier until the freight

(*a*) 5 Term Rep. 683. (*b*) 1 Barn. & Cres. 181; *S. C.* 2 Dow. & Ryl. 288.

for the whole cargo was either tendered or paid, or until he had done some act, shewing that he assented to part with the possession of the goods without receiving his freight. And Lord Chief Justice *Abbott* there said: "The whole question is, whether there had been a delivery or not? There is no case in which a carrier, having begun to deliver and afterwards discontinued, has been held to have made a complete delivery of any part of the goods;" and Mr. Justice *Bayley* said: "There can be no doubt, that wherever there is a complete delivery of part of one entire cargo to the consignee, the *transitus* is ended, and the consignor cannot stop the remainder; but, in order to divest the consignor's right to stop *in transitu*, there ought to be such a delivery to the consignee as to divest the carrier's lien upon the whole cargo." In *Stoveld* v. *Hughes* (*a*), the timber was marked by the vendee, and that was considered equivalent to a delivery. There, too, the rights of third parties had intervened, the original vendee having re-sold it to another; but the delivery of a part is not to be considered as a delivery of the whole, so as to defeat the consignor's right to stop *in transitu*, which is an anomaly in law, and a right peculiar to itself. In *Loeschman* v. *Williams*, the delivery was incomplete, as the goods were to be held till paid for in ready money; but here, there was, in fact, no delivery at all, for the flour in question never arrived at its place of destination, but was on its passage to the consignee. Although it has been said, that the ship may be considered as the defendant's warehouse—the question is, when did it become so? The award finds, that, "if no bill of lading, or invoice, was produced by the time the vessel began to take in her return cargo, then the flour was landed, and placed in the defendant's warehouses, *and there kept to the order of the shippers;*" and that period had not arrived. At

(*a*) 14 East, 308.

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all events, there could be no formal delivery to *Gilbert*, until the invoice was produced, and till then the defendant could not know that he had any interest in the flour. He did not consent to hold it for him, or for any other person than the consignors; and as it was not landed when it was demanded by them, the voyage was not determined, nor was the *transitus* at an end.

Mr. Serjeant *E. Lawes*, in reply.—The only case that bears on this question is, that of *Crawshay* v. *Eades*, which is altogether distinguishable, as there the question involved the carrier's right of lien; the Court holding that the special property in the goods remained in him, until the freight for the whole cargo was either tendered or paid. A wharfinger is answerable to the consignee, as soon as the goods consigned arrive at his wharf; and although it has been said, that, in this case, the defendant did not know, at the time of the arrival of the flour, that it was consigned to *Gilbert*; and that, as he had received no notice of that fact, he had not assented to receive or hold it on his behalf, yet the ship which contained it, must be considered as part of the wharf, and, according to the late case of *Buszard* v. *Capel* (*a*), might have been distrained for rent; and as the flour was, by the manifest, made deliverable to order, it was immaterial whether a bill of lading or an invoice were produced, on behalf of the bankrupt, for whom the flour was purchased and shipped.

[Mr. Justice *Park*, referred to the case of *Hunter* v. *Beale* (*b*), where Lord *Mansfield* said, that, in order to constitute a complete legal delivery, the goods must have come to the *corporal touch* of the vendees; and *Akerman* v. *Humphery* (*c*), where the consignee of goods having handed over the shipping note and a delivery order to the wharfinger,

(*a*) 4 Bing. 137. (*b*) 3 Term Rep. 466, n.
(*c*) 1 Car. & Payne, 53.

requiring him to deliver such goods, on arrival, to *J. S.*, it was held not to pass the property in the goods, so as to divest the consignor's right of stoppage *in transitu.*]

Cur. adv. vult.

Mr. Justice PARK, now delivered the judgment of the Court, as follows:—This case came before the Court, upon a motion to set aside an award (in part) of a learned barrister, and which, from the importance of it, we desired might be argued as a special case. The action was an action of trover, and it had been referred by an order of my Lord Chief Justice, since made a rule of Court, to the award of Mr. *Archbold.* The claim was for three several parcels of flour, one of the value of *262l.* 10*s.*, for which the arbitrator decides that the plaintiffs are to recover; one of fifty sacks, and he decides that for those the plaintiffs are not to recover; so that upon these two points no question now arises. The third parcel consisted of twenty-five sacks of flour, amounting in value to *52l.* 10*s.*; and as to these, the arbitrator states a variety of facts, upon which he wishes to take the opinion of the Court, and that is the point upon which the argument has been founded. The question is, whether Messrs. *Wilkinson*, the shippers of the flour, had a right to stop it *in transitu* under the circumstances of the case. The facts found by the arbitrator are these [The learned Judge here read them, as stated in the award, and then proceeded as follows:]—Upon these facts it was contended, on the part of the assignees, that, by the arrival of the ship *at the wharf*, the transit was over; that the ship was to be considered as much the warehouse of *Gilbert*, the bankrupt, as any other part of the wharf; and the goods as much in his possession, and under his control, as if they had been marked by the bankrupt, and warehoused in his name, or under his lock and key. This has been well argued on both sides; and no one can doubt, that, if such a state of things, as is above supposed,

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had existed, such as the goods being put into a warehouse on the wharf, which the bankrupt, having no warehouse of his own, had been in the habit of using as his own; and, had he marked or done some act upon them, the transit would have been over: but the question is, whether that be the state of things. The general nature of the right to stop *in transitu*, has, very properly, not been argued; for although, comparatively speaking, such right has not been long known to the Courts of common law, perhaps not more than seventy years, having been, about that time, transplanted from the Court of Equity; yet, it has since been established by such a variety of decisions, that it is now regarded with favour by the former, as a right which they are always disposed to assist; not proceeding at all on the ground of the contract being rescinded by the insolvency or bankruptcy of the consignee of the goods, but as an equitable right adopted for the purposes of substantial justice. But this case has been correctly argued upon the ground, whether the *transitus* was continuing, or whether it was at an end and determined. Every case of this sort must depend on its own special circumstances. In some of the earlier cases, particularly in that of *Hunter* v. *Beale*, Lord *Mansfield*, who carried the doctrine of stoppage *in transitu* a great way, seemed to expect that the goods must come to the actual *corporal touch* of the vendee; but in the subsequent case of *Dixon* v. *Baldwin* (*a*), Lord *Ellenborough* repudiates that extent of the doctrine, and puts it upon a better footing, and says, "the question is, whether the party, to whose touch it actually comes, be an agent so far representing the principal as to make the delivery *to him* a full, effectual, and final delivery to the principal, as contra-distinguished from a delivery to a person acting virtually as a carrier, or mean of conveyance, to or on account of the principal in a mere

(*a*) 3 East, 184.

course of transit towards him. In *Hunter* v. *Beale*, I cannot but consider the transit as having been once completely at an end, in the first course of the goods to the innkeeper, and that they were afterwards *under the immediate orders of the vendee.*" Apply that latter principle to this case; and supposing, merely for argument, that these goods had actually arrived on the wharf, yet, were they ever *under the immediate orders of the vendee?* On the contrary, the flour in question had arrived at the wharf on the 12th, but was not landed till the 22nd, of the month of *April;* no act of ownership was exercised over it by *Gilbert;* no invoice, no bill of lading, was ever produced by him, or any agent employed on his behalf, till the messenger under the commission claimed the flour on the 19th of the same month, the shippers having actually stopped it two days before; so that the very first act done upon this flour after the ship's arrival at the wharf, was done by the shippers, before the transit to the hand or possession of the vendee was complete. Nothing, however, that I have hitherto said, means to impeach the doctrine first broached by the late Mr. Justice *Chambre* in *Richardson* v. *Goss* (*a*), adopted and approved of by Lord *Alvanley*, when Chief Justice of this Court, in *Scott* v. *Pettit* (*b*), and lately by my brother *Bayley*, in the case of *Foster* v. *Frampton* (*c*). The doctrine was this, to which I, speaking only for myself in this point, fully accede, that if a man be in the habit of using the warehouse of a wharfinger as his own, and make that the repository of his goods, and dispose of them there, the *transitus* will be at an end when the goods arrive at such warehouse. In the first of these cases, the trader had no warehouse of his own, but used that of his packer for receiving goods consigned to him; and it was held that the *transitus* of such goods was at an end upon

(*a*) 3 Bos. & Pul. 127. (*b*) 3 Bos. & Pul. 472.
(*c*) 6 Barn. & Cres. 109.

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delivery of them to the packer. In *Foster* v. *Frampton*, the vendee of several hogsheads of sugar, upon receiving *notice of their arrival, took samples from them*, and, for his *own convenience*, desired the carrier *to let them remain in his warehouse till he should receive further directions;* and it was held, upon the bankruptcy of the vendee, that the *transitus* was at an end, and that the vendor could not stop them. So here, if *Gilbert* had taken samples of the flour, or done any other act exerting his authority over it, that would have varied the case; but no such facts, nor any facts amounting to these, are found upon this award. I forbear to go through all the mass of cases which have been decided on this subject; because they would only fatigue the Court, and delay the other important business of the Term. I believe all of them were quoted on one side or the other, by the learned counsel, in the course of the argument. I have looked at all of them; and the doctrine now stated by me is not impugned by any. One point only remains to be considered. It is supposed that the fact found by the arbitrator, *viz.* that Messrs. *Wilkinson & Co.*, when they shipped the flour, sent an invoice thereof to *Gilbert*, made an essential difference, and gave him, by virtue of the invoice, a perfect control over it. But this, surely, cannot be meant as a serious argument: even a bill of lading, while in the hands of the original consignee unindorsed, cannot interfere with the vendor's right to stop the goods before they arrive into the possession, or under the control, of the consignee, if he become bankrupt or insolvent. If, indeed, the consignee assign the bill of lading to a third person for a valuable consideration, *bonâ fide*, without notice of such circumstances as render the bill of lading not fairly and honestly assignable, the right of the consignor, as against such assignee, is divested; for a bill of lading, so as above indorsed, transfers the property: but I have never before now heard it contended, except once, that the *mere pos-*

session of an invoice, which is only a mercantile name for a bill of parcels or a shop bill, could bar the vendor's right. The very contrary to this has been decided in a case of *Akerman* v. *Humphery* (*a*), tried before my brother *Burrough* in *December*, 1823, where he decided, that the delivery of a shipping-note by the consignee of goods to a third person, with an order to the wharfinger to deliver the goods to such third person, did not pass the property in them so as to prevent a stoppage *in transitu* by the consignor. A verdict, therefore, upon the opinion of my learned brother *Burrough*, passed for the defendant, with liberty for the plaintiff to move to enter a verdict for him. Mr. Serjeant *Taddy*, accordingly made such motion; but Lord *Gifford*, then Chief Justice, and myself, thought the opinion delivered by the learned Judge at the trial was correct; and no rule was granted. That opinion applies most pointedly to the present case; for it is there stated, that a shipping-note and a delivery-order to the party, made no change of property; that they did not amount to a bill of lading, which is exactly like a bill of exchange, the property mentioned in it passing by indorsement, but not by delivery without indorsement. The shipping-note, from its nature, is not indorsible; and, in point of fact, neither the shipping-note in that case, nor in this, was indorsed. For these reasons, we are of opinion, that the award is good upon the two first points, but bad upon the third; that is, that the consignor had a right to stop the twenty-five sacks of flour *in transitu*.

Rule absolute to reduce the sum of 315*l.* to 262*l.* 10*s.*, and that the award should stand for the latter sum.

(*a*) 1 Carr. & Payne, 53.

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Tuesday, Feb. 12*th.*

In an action for freight and demurrage, by ship-owners against the charterer, the Court will not grant the latter an inspection of the log-book kept during the voyage.

RUNDLE and Others *v.* BEAUMONT.

THIS action was brought to recover a sum of money, alleged to be due from the defendant to the plaintiffs for freight, or passage money, of certain passengers, under a charter-party, entered into, by two of the plaintiffs, with the defendant, on behalf of the owners of a ship called The Countess of *Morley*, bearing date the 30th *September*, 1825; and also to recover divers other large sums of money, alleged to be due from the defendant to the plaintiffs, for the demurrage of the said ship, and the use and employment thereof, subsequently to the voyage contemplated by the charter-party; and also for victualling the said passengers subsequently to the said voyage.—And the defendant stated, that he considered the production of the *log-book* of the said ship, The Countess of *Morley*, kept during the voyage stated in the declaration in this cause, material to the defence of this action, but that the attornies of the plaintiffs, on application made to them by the attornies of the defendant, had declined to produce the same, or to permit an inspection thereof.

On an affidavit of these facts by the defendant, Mr. Serjeant *Jones*, on a former day in this Term, obtained a rule, calling on the plaintiffs, or their attornies, to shew cause why they should not permit the defendant, or his attornies, to inspect the log-book of the said ship, kept during the voyage stated in the declaration, and to take a copy thereof, or extracts therefrom. He submitted, that a log-book was in the nature of a public document, and kept for the benefit of all parties who have an interest in a vessel; that it ought to contain a true and accurate account of every material circumstance that may have occurred in the course of a voyage; and that the party keeping it must be considered as the agent of the own-

ers. In *D'Israeli* v. *Jowett* (*a*), the log-book of a man-of-war, which convoyed a fleet, was admitted in evidence, to prove the time of the convoy's sailing; and in a note to the case of *Watson* v. *King* (*b*), a log-book was taken to be good evidence of facts therein stated respecting a storm encountered by ships under convoy. At all events, it is evidence against the party keeping it. The charterer of a vessel has an interest in the log-book as well as the owners, and it is quite clear that it may be given in evidence against the latter; and the captain, or master, must be considered as their agent, whose duty it is to make the regular entries in the book.

Mr. Serjeant *Wilde*, now shewed cause.—The case of *Rowe* v. *Howden* (*c*), is infinitely stronger than the present; there, in an action by the owners of a ship, against a broker employed by them to procure a cargo, the Court refused to order the latter to allow the former to inspect or take a copy of a letter received by him from a correspondent abroad, although he acted as such broker at the time; and the Court there discharged the rule with costs. The principle applicable to questions of this nature has been so fully and satisfactorily laid down in *Ratcliffe* v. *Bleasby* (*d*), that the Court will not recede from it, and that case is of itself a sufficient answer to the present motion. In the case of The Mayor of *Southampton* v. *Graves* (*e*), the Court of *King's Bench*, pending an action by a corporation for tolls, would not grant leave to inspect the corporation muniments, on the application of the defendant, a stranger to the corporation; and here, the defendant has merely sworn, that he considers the production of the log-book material to the defence of this action, without stating for what purpose. He may give the plain-

(*a*) 1 Esp. N. P. C. 427.
(*b*) 4 Camp. 275.
(*c*) Ante, 334.
(*d*) 3 Bing. 148.
(*e*) 8 Term Rep. 590.

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tiffs notice to produce it at the trial. Although the master of a vessel usually keeps such book, it is not in the nature of a public book, as it merely contains minutes taken during the course of the voyage; and the defendant can have no interest in it, nor can the plaintiffs be considered as trustees, and holding it for him as such.

Mr. Serjeant *Jones*, in support of his rule.—The simple question is, whether, in an action for freight by the owners against the charterer of a vessel, the latter may inspect the log-book kept during the voyage. The defendant has clearly an interest in the book; as, in marine law, it is in the nature of a public document, and is always kept either by the master or the mate of the ship; and from *Goldschmidt* v. *Marryat* (*a*), it seems, that, in policy causes, a Judge, at Chambers, will make an order for the assured to produce to the underwriters, upon affidavit, all papers in the possession of the former relative to the matters in issue; and Sir *James Mansfield* said: "That he thought that such orders had been very properly introduced, as they often obviate the necessity of going into a Court of Equity, and save a great deal of delay, expense, and litigation." An action on a policy is analogous to that on a charter-party, and if the order be granted in the one case, it surely ought to be allowed in the other; and more particularly so, as the charterer of a vessel has an interest in the voyage, and every proceeding relative to it ought to be recorded in the log-book. Although, *in Clifford* v. *Taylor* (*b*), it was held sufficient, under a Judge's order to produce papers and give copies, to give extracts of those parts of letters which are relevant to the ship; yet, in policy causes, the assured may be ordered to produce *all* the papers in their possession relative to the matter in issue; and in *Ratcliffe* v. *Bleasby*,

(*a*) 1 Camp. 562. (*b*) 1 Taunt. 167.

the party applying required a copy of a draft of articles of co-partnership, as well as the deed itself, and the Court granted him an inspection and copy of the draft, but refused it as to the deed.

Mr. Justice PARK.—I am clearly of opinion, that there is no pretence whatever for this application; and I should not have yielded to it in the first instance, had not some decisions at *Nisi Prius* been cited, on which it was submitted that the motion might be supported. I agree, that a log-book is of itself evidence of the facts therein contained. In *D'Israeli* v. *Jowett*, the log-book of a man-of-war, which convoyed a fleet, was admitted in evidence, for the purpose of proving the time of the convoy's sailing, and when another ship became part of the convoy. There, however, the book might be considered as a public book, as it was produced by one of the officers of the *Admiralty*, where it was lodged; and yet Lord Chief Justice *Eyre* said, that he had some difficulties as to the admissibility of this kind of evidence, and wished that the opinion of the Court was taken on it. So, in *Watson* v. *King*, the log-book, and an official letter of the commander, to the *Admiralty*, were read, to prove that the fleet encountered a storm, and that a particular vessel parted company. These cases therefore are altogether beside the present question, and if we were to yield to the application, we should be going much farther than has ever yet been done. The defendant has not alleged in his affidavit that he has any interest in the book. His assertion, that he considers its production necessary to his defence, is couched in vague and general terms, and we cannot grant an order to inspect books or papers, unless the facts and reasons for so doing are fully disclosed to us, as the party may have redress by applying to a Court of Equity. In policy causes, where the plaintiff consents to enter into a consolidation

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rule, terms are generally imposed on the defendant, to produce all books and papers material to the point in issue (*a*). There, however, there is a *quid pro quo*, as defendants on the one hand may have questions of real importance tried at a trifling expence, and plaintiffs are not delayed in their suits by those arts which were formerly resorted to in order to evade the payment of just demands. Independently of this, however, I am of opinion, that we must be bound by our decision in the late case of *Ratcliffe* v. *Bleasby*, which, it appears to me, was decided on a true and sound principle.

Mr. Justice BURROUGH.—If the log-book in question were to be used in evidence *per se*, we might perhaps call on the plaintiffs to produce it, or grant the defendant an inspection of it. But if not, we cannot yield to such an application on mere conjecture. It was incumbent on the defendant to have shewn us for what specific purpose he required its inspection; and he will be compelled to do so, if he proceed by filing a bill in a Court of Equity; and here he has applied to inspect the whole contents of the book, on the mere ground, that its production is necessary to his defence in this action.

Mr. Justice GASELEE.—The defendant, at first, made an application to me at Chambers, and I requested him to come to the Court, it having been insisted that no distinction could be drawn between an action on a policy and on a charter-party. Applications to produce books and papers previously to a trial have greatly increased of late years, but they ought not to be granted, unless the reasons for such production are fully stated and explained to us. But as I encouraged the defendant in this case to apply to the

(*a*) See Park on Insurance, 6th Edit. Introduction, xlii.

Court, I think the rule ought to be discharged without costs.

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The rest of the Court concurring—

Rule discharged without costs.

REGULA GENERALIS.

WHEREAS great expense is often unnecessarily incurred in making up demurrer books, from setting forth those parts of the pleadings to which the demurrers do not apply: It is therefore ordered, that, from and after the end of this present *Hilary* Term, when there shall be a demurrer to part only of the declaration, or other or subsequent pleadings, those parts only of the pleadings to which such demurrer relates, shall be copied into the demurrer books; and, if any other parts shall be copied therein, the Prothonotary shall not allow the costs thereof on taxation, either as between party and party, or attorney and client.

J. A. PARK.
J. BURROUGH.
S. GASELEE.

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IN THE EXCHEQUER CHAMBER.

Tuesday, Jan. 29th.

GOLDSTEIN *v.* Foss and Another.
[In Error.]

[T. T. 6 *Geo.* 4, K. B. Roll 2745.]

In an action for a libel, the declaration—after reciting, that divers persons had been associated together, under the name of "The Society of Guardians for the Protection of Trade against Swindlers and Sharpers;" and that the defendant, under colour of being the secretary of the said society, had, from time to time, published, and was accustomed to publish, certain printed reports, for the purpose of denoting to the members of the said society the names of such persons as were deemed swindlers and sharpers, and improper persons to be proposed to be ballotted for as members of the said society;—set out the following libel, of and concerning the plaintiff: "Society of Guardians for the Protection of Trade against Swindlers and Sharpers; I (meaning the defendant) am directed to inform you, that *G.* (meaning the plaintiff) *& C.*, are reported to this society, as improper to be proposed to be ballotted for as members thereof (meaning that the plaintiff was a swindler and sharper, and an improper person to be a member of the said society)." After verdict for the plaintiff, and writ of error brought:—Held, that the innuendo was not warranted by the libel; and that the words of the libel, unexplained by introductory matter, were not actionable.

THIS was an action for a libel. The *first* count of the declaration—after reciting, that the plaintiff was of good name, fame, and credit, and that he had, for divers years last past, used, exercised, and carried on, the trade or business of a merchant, in partnership with one *Alexander Cohen Castle*, and, in the exercise of the said trade and business, had always behaved himself faithfully and honestly, and with great integrity, with those who had dealt with, or employed him, and never was guilty, or, until the committing of the grievances by the defendants, as thereinafter mentioned, been suspected to have been guilty of swindling, cheating, or defrauding, or in any wise acting dishonestly to any person or persons whomsoever—stated: "That before the committing of the grievances in the first count mentioned, divers persons had been and were associated together, under the name and description of 'The Society of Guardians, for the Protection of Trade against Swindlers and Sharpers;' and the defendant, *Foss*, under colour and pretence of being the secretary of the said society, had, from time to time, published, and was accustomed to publish, certain printed reports, for the purpose of denoting and signifying, to the members of the said society, the names of such persons as were deemed and considered swindlers and sharpers, and improper persons to be proposed to be ballotted for as members of the said

society, to wit, at &c. Yet the defendants, well knowing the premises, but greatly envying the happy state and condition of the plaintiff, and contriving, and wickedly and maliciously intending, to injure the plaintiff in his aforesaid good name, &c., and to bring him into public scandal, infamy, and disgrace, with and amongst all his neighbours, &c.; and to cause it to be suspected and believed by those neighbours, &c., that he, the plaintiff, had been, and was guilty of the offences and misconduct hereinafter mentioned to have been charged upon and imputed to the plaintiff, and thereby to injure him, the plaintiff, in his said trade and business, and to vex, harass, oppress, impoverish, and wholly ruin him, the plaintiff, heretofore, to wit, on &c., at &c., falsely and maliciously did compose, print, and publish, and cause and procure to be composed, printed, and published, of and concerning the plaintiff, a certain false, scandalous, malicious, and defamatory libel, containing (amongst other things) the false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the plaintiff, in the way of his said trade and business; that is to say, '10 Correspondence, 1825. Society of Guardians for the Protection of Trade against Swindlers and Sharpers; *Richard Clark*, Esq., Chamberlain of *London*, President; *George Bridges*, Esq., Alderman, and M.P., Vice-president; Messrs. *William Praed & Co.*, Bankers, Treasurers; I (meaning the defendant, *Foss*) am directed to inform you, that the persons undernamed, or using the firms of *Goldstein* (meaning the plaintiff), *Castles & Co.*, 51, *Mark Lane;* and *Benjamin Porter*, baker, *Hackney Road*, are reported to this society as improper to be proposed to be ballotted for as members thereof,' (thereby then and there meaning, that the plaintiff was a swindler and sharper, and an improper person to be a member of the said society)."—The declaration contained three other counts, in which the introductory statement, as to the nature of the society, and the pro-

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ceedings of *Foss*, was omitted; and it concluded by stating, that, "by means of the committing of the grievances by the defendants, the plaintiff had been greatly injured in his good name, &c., and brought into public scandal, infamy, and disgrace, insomuch that divers of his neighbours suspected and believed him to be a swindler and sharper, and improper to be a member of the society, and had refused to have any transaction or acquaintance with him, as they were before used and accustomed to have, &c. &c." Plea—Not Guilty.

At the trial, before Lord Chief Justice *Abbott*, at *Westminster*, at the Sittings after *Hilary* Term, 1826, a verdict was found for the plaintiff, on the first count of the declaration.—Damages, 150*l*.

A rule *nisi* for arresting the judgment was granted in *Easter* Term following, and made absolute in *Hilary* Term, 1827, on the grounds, that the inducement in the first count was not connected with the statement of the libel, so as to authorise the insertion of an innuendo enlarging the meaning of the words of the libel; and that, without the innuendo, such words did not appear, in themselves, to be actionable. The plaintiff, in the last Term, brought a writ of error, assigning that the first count of the declaration, and the matters therein contained, were sufficient in law for him to have and maintain his action against the defendants.—Joinder by the defendants.

Mr. *F. Pollock*, for the plaintiff.—The declaration contains sufficient introductory matter to warrant the innuendo, or, at all events, quite enough to shew the nature of the plaintiff's complaint, and the injury he had sustained by the publication of the libel; and although the objection might have been held good on special demurrer, yet the defect (if any) is cured by verdict. In *Rex* v. *Lyme*

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Regis (*a*), Mr. Justice *Buller* said: "Lord *Coke* has distinguished certainty in pleading into three sorts; *first*, certainty to a common intent, which is sufficient in a plea in bar; *secondly*, certainty to a certain intent in general, as in counts, replications, &c., and so in indictments; *thirdly*, to a certain intent in every particular, which is necessary in estoppels. The *second* of those sorts I take to mean, what, upon a fair and reasonable construction, may be called certain, without recurring to *possible* facts, which do not appear." Although mere hypothetical notions are not to be introduced, yet here, the declaration is such as on a fair and reasonable construction may be called certain, without travelling out of the record to explain its meaning; and full effect has been given to it by the finding of the Jury. In *Williams's Saunders* (*b*), it is said, that "where there is any defect, imperfection, or omission, in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer; yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed, that, either the Judge would direct the Jury to give, or the Jury would have given, the verdict, such defect, imperfection, or omission, is cured by the verdict, by the common law;" and numerous authorities are referred to in support of that position. Here, however, it was objected in the Court below, that the innuendo could not be supported, as it was not connected with the *colloquium*, or introductory part of the declaration; and that it extended the meaning of the alleged libel, to which alone it must be taken to refer. Another objection raised to this declaration by Lord Chief Justice *Abbott*, was, that there are two societies mentioned in the declaration, *viz.* one in the introduction, and another in the libel set out; and

(*a*) 1 Doug. 158. (*b*) Vol. 1, p. 227, n. (1).

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that it does not appear to which of them the innuendo refers. But that is not so, for it is necessary to travel out of the declaration in order to frame a supposition, that there are two societies. The *colloquium* states—"that divers persons had been associated together, under the name and description of the Society of Guardians for the Protection of Trade against Swindlers and Sharpers, and that the defendant *Foss* was the secretary of the said society." The libel expressly mentions, and refers to, one and the same society; and it is, therefore, quite clear, that the society mentioned in the introductory part of the declaration is the same as that afterwards named in the libel, and referred to in the innuendo which immediately follows, where it is stated, that the meaning of the libel was, that the plaintiff was a swindler and sharper, and an improper person to be a member of the *said* society, which society was designated by a particular name in the introductory part of the declaration, corresponding with that set out in the libel, which is, of itself, actionable, as the words were published of the plaintiff in his way of business, or, at all events, imputed to him that he was a swindler and sharper. The main question is, what is the effect and meaning of the innuendo? If it had stopped at the words "swindler and sharper," without going on to say, "and an improper person to be a member of this society," there would have been no difficulty whatever; and, if so, the latter part is immaterial, and may be rejected as surplusage. It is unnecessary to go through all the cases on the subject. It is quite clear, that an innuendo cannot be introduced, to extend or enlarge the meaning of a libel, unless connected with some matter introductory; but it may shew, that words, admitting of many interpretations, were used in one particular sense, as, if spoken ironically; and where words have, in themselves, no particular or definite meaning, a meaning may be supplied by an innuendo, to shew

that they were spoken offensively. The true distinction is, that an innuendo may be used as a word of explanation, but not to extend the sense of expressions beyond their ordinary construction; for instance, in an action on the case against a man for saying of another, "he has burnt my barn," the plaintiff cannot, by way of innuendo, say, meaning his barn full of corn, because that is not an explanation of what was said before, but an addition to it. The plaintiff, here, has stated that the defendant *Foss*, under colour of being the Secretary of the society, was accustomed to publish certain printed reports, for the purpose of denoting to the members of the society the names of such persons as were deemed swindlers and sharpers. That was the object of the libel, and the plaintiff might shew that it was published for that purpose; and the Jury have so found by their verdict. The meaning of words written or spoken is purely a question of evidence, and the office of an innuendo is, to render that sense, which appears to be nonsense; and if a publication profess to eulogize an individual, if the writer meant the reverse, the party libelled may shew that it was intended to injure him, and explain the nature of the libel by innuendo; as, for instance, if a person were to state, *J. S. is a very honest man!!!* although it may be taken to convey praise, it may be explained, by shewing that the writer meant quite the reverse, and intended to convey the idea of censure. Although, in *Rex* v. *Horne*, Lord Chief Justice *De Grey* said (*a*), That as an innuendo is only used as a word of explanation, it cannot extend the sense of expressions in a libel beyond their own meaning, unless something be put upon the record for it to explain: yet that was a criminal case, and the defendant had been guilty of an indictable offence: But in *Roberts* v. *Camden* (*b*), it was held, that the rule of construction, as to slanderous words, is, to construe them in their plain and

(*a*) Cowp. 684. (*b*) 9 East, 93.

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popular sense, *viz.* such in which an ordinary hearer would have understood them at the time they were spoken; and that, where new matter, introduced by an innuendo, without any antecedent *colloquium*, to which it can refer, to support it, is not necessary to maintain the action, it may be rejected as surplusage. In *Roach* v. *Ostler* (*a*), a letter written by the drawer, to the payee of a bill, expressing his apprehension that it would be dishonoured, coupled with the fact, that the place to which the bill was directed, was the usual residence of the drawer, was held, to be evidence from which a Jury might infer the identity of the drawer and drawee. So here, it must be presumed, after verdict, that the society referred to in the innuendo was the same as that mentioned in the *colloquium*, or introductory part of the declaration, and which corresponded in terms with that set out in the libel, which was published with two views, *first*, to designate the plaintiff as a swindler and sharper; and, *secondly*, that he was an improper person to be proposed to be ballotted for as a member of the society. No introductory words were necessary; and as the innuendo has in terms given the true meaning and effect of the words of the libel, it is of itself sufficient. It was clearly the object of the defendants to convey the idea that the plaintiff was a sharper; and the Jury have so found in effect, and if the verdict be allowed to stand, no rule of pleading will be violated; and the plaintiff is clearly entitled to a recompence for the injury his character has sustained by the publication in question.

Mr. *Campbell*, *contra*.—The Court below, with the exception of Mr. Justice *Holroyd*, who was absent on account of indisposition, were unanimously of opinion that the declaration was bad, in arrest of judgment. It has been ad-

(*a*) 1 Mann. & Ryl. 120.

mitted that the innuendo is necessary; and, as the plaintiff has chosen thereby to give the words of the libel a certain and definite meaning, if they will not admit of that construction, the declaration cannot be supported. Still, however, it has been said, that, as the Jury have found the meaning of the libel to be, to impute dishonesty to the plaintiff, no objection can be taken to the insufficiency of the declaration, after verdict. But, unless the law be altogether remodelled, it can never be open to a plaintiff to put any meaning he pleases on the words of a libel by the introduction of an innuendo. It is a well known and established rule of pleading, that an innuendo cannot extend the meaning of a libel, without being clearly connected with some introductory matter, to explain how the libel bears that extended meaning. If the defendant had reported to the society that the plaintiff was a person of particular stature or complexion, and the innuendo, without any introductory matter to explain the import of those words, had stated that he thereby meant to convey that the plaintiff had been guilty of an atrocious offence, could the action be maintained? Although, where words are equivocal, and have several meanings, an innuendo may explain in what sense the writer or speaker intended them to be understood, yet their meaning cannot be enlarged or changed. In *Williams's Saunders* (*a*), it is said: "An innuendo is only explanatory of some matter already expressed; it serves to point out where there is precedent matter, but never for a new charge; it may apply what is already expressed, but cannot add, or enlarge, or change, the sense of the previous words." In *Rex* v. *Horne*, Lord Chief Justice *De Grey*, in delivering the opinion of the Judges in the House of Lords, said (*b*): "An innuendo means nothing more than the words '*id est*,' '*scilicet*,' or '*meaning*,' or '*aforesaid*,' as explanatory of a sub-

(*a*) Vol. 1, p. 243, n. (4). (*b*) Cowp. 684.

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ject-matter sufficiently expressed before; as, such a one, *meaning* the defendant, or, such a subject, *meaning* the subject in question. But, as an innuendo is only used as a word of explanation, it cannot *extend* the sense of the expressions in the libel beyond their own meaning, unless something is put upon the record for it to explain; as, in an action upon the case against a man for saying of another, 'he has burnt my barn,' the plaintiff cannot there, by way of innuendo, say, *meaning* 'his barn *full of corn*,'—*Barham's* case (*a*); because that is not an *explanation* of what was said before, but an *addition* to it. But if, in the introduction, it had been averred, that the defendant had a barn *full of corn*, and that, in a discourse about that barn, the defendant had spoken the words charged in the libel of the plaintiff, an innuendo of its being the barn full of corn would have been good; for, by coupling the innuendo in the libel with the introductory averment, 'his barn full of corn,' it would have made it complete." In *Holt* v. *Scholefield* (*b*), which was an action for slander, the words spoken and innuendo were as follow:—"*Tim. Holt* (meaning the plaintiff) has *forsworn* himself (meaning that the plaintiff had committed wilful and corupt perjury); and it was held, that, in the absence of a *colloquium* in the introductory part of the declaration, the words spoken had not the meaning attributed to them by the innuendo; and that the declaration was bad, after verdict for the plaintiff, in arrest of judgment; and Lord *Kenyon* there said: "Either the words themselves must be such as can only be understood in a criminal sense, or it must be shewn, by a *colloquium* in the introductory part, that they have that meaning, otherwise they are not actionable;" and Mr. Justice *Lawrence* said: "If words are not actionable in themselves, their meaning cannot be extended by an innuendo." In *Hawkes* v. *Hawkey* (*c*),

(*a*) 4 Rep. 20 a. (*b*) 6 Term Rep. 691. (*c*) 8 East, 427.

it was also held, that the meaning of a libel cannot be extended by an innuendo, unless properly connected with it by some preceding or introductory matter.

Mr. *F. Pollock*, in reply.—It must be admitted, that an innuendo cannot introduce a new fact, or change the sense of previous words; but, if the words of a libel be equivocal, and of doubtful meaning, it is equally clear that they may be explained by an innuendo. The defendant has in terms represented the plaintiff to be a swindler and sharper; and, although the words of themselves do not impute that character to him, yet, as they were spoken of him in the way of his business, they are actionable; and the introductory matter in the declaration is sufficient to warrant the innuendo. Although the Lord Chief Justice, in delivering his judgment in the Court below, laid great stress on the circumstance, that the introduction and libel *each* mentioned a society, and that the words *said society* in the innuendo could not mean the society spoken of in the introduction, two societies having been before mentioned; yet it is quite clear, that the plaintiff, throughout the whole declaration meant to refer to one and the same society; for the society mentioned in the libel is the same as that, the nature and proceedings of which are mentioned and referred to in the *colloquium*.

Lord Chief Justice BEST delivered the judgment of the Court as follows:—This was an action for a libel. The first count of the declaration began by reciting, that divers persons had been associated together under the name and description of "The Society of Guardians for the Protection of Trade against Swindlers and Sharpers;" and that the defendant *Foss*, under colour of being secretary of the said society, had from time to time published, and was accustomed to publish, certain printed reports, for the purpose of denoting to the members of the said society the names of such

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persons as were deemed and considered swindlers and sharpers, and improper persons to be proposed to be ballotted for as members of the said society. The libel was then set out, and is in these words:—" Society of Guardians for the Protection of Trade against Swindlers and Sharpers,—*Richard Clark*, &c., President, *George Bridges*, &c., Vice President, Messrs. *Praed & Co.*, Bankers, Treasurers—I am directed to inform you, that the persons under-named, or using the firms of *Goldstein, Castles & Co.*, 81, *Mark Lane;* and *Benjamin Porter, Hackney Road*, are reported to this society as improper to be proposed to be ballotted for as members thereof;" and then the innuendo is introduced, " thereby then and there meaning that the plaintiff was a swindler and sharper, and an improper person to be a member of the *said* society." We are of opinion that this declaration is insufficient; and the Court below entertained no doubt of it, when they ordered the rule for arresting the judgment to be made absolute; but the propriety of that judgment has been since doubted, and the plaintiff has thought fit to appeal to this Court, where the question, as to the sufficiency of the declaration after verdict, has been again raised; and, after a most ingenious argument for the plaintiff, and a full consideration of the weight due to it, this Court are of opinion, that the judgment of the Court below is right. But it has been now urged, that, if the declaration cannot be supported, the plaintiff cannot obtain redress against an attack on his character, published and sanctioned by an unauthorised society. This, however, does not appear to us to be the result, as the plaintiff may frame his record so as to reach the secretary of the society, if his report be unfounded or false. But we are of opinion, that the facts stated in the declaration are not sufficient for us to collect the true construction to be put on the libel, or whether, from its import, it can be made the subject of an action. The innuendo seeks to extend and not to explain the na-

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tural meaning of the libel, and introduces a new and substantive fact, *viz.* that the libel intended to charge the plaintiff with being a swindler and sharper.—This is not the natural import of the words contained in the libel, and the Court cannot put such a construction on them as is inferred by the innuendo. The defendant, *Foss*, as secretary of the society, did not report the plaintiff to be a swindler and sharper, but merely as an improper person to be ballotted for as a member of the society. Now, there may be numerous reasons why a person may not be fit to become a member of such a society, although he be not a swindler or sharper. He might be deemed unfit, if he were old or infirm, or exercised a certain trade or profession, or if he did not appear to be an active person, or one likely to advance the object of the society, the discovery of swindlers and sharpers. Although a person be dishonest, his being merely reported as unfit or improper to be proposed as a member of a particular society, does not, of itself, imply that he is dishonest. So, if a man were a fit person to become a member, and the secretary were to report that he was unfit, the inference would be merely, that he was an improper person; but if he were to report, that, from fraud or malpractices, he was improper to be proposed as a member, so that the society could thereby understand that he was a sharper, the question would be altogether different; and then the Court could also understand it. The authorities cited for the defendants clearly shew, that an innuendo is only explanatory of some matter already expressed, and cannot point out a new charge, or introduce a new fact, or add, enlarge, or change the sense of previous words. Looking, therefore, at the words of the libel, without reference to the introductory matter in the declaration, they do not appear to us to warrant the innuendo, that the plaintiff was a swindler and sharper, merely on the ground that he had been reported to be an improper person to become a member of the society. We

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cannot clearly see on the face of the record, that the communication, or report, by the defendant, *Foss*, to the members of the society, meant to impute, that the plaintiff was a sharper. It was contended, at the outset of the argument, that, even if the declaration were insufficient or imperfect, it was cured by verdict; but we are to look at the words of the instrument as set out on the record, and to construe them according to their natural import. The introductory part of the declaration contains a mere loose statement, and must stand by itself, and if the objection were to prevail, it would deprive the Court of one of their greatest privileges, *viz.* that of arresting a judgment after verdict, in case a record should turn out to be defective; and by the stat. *32 Geo. 3*, c. 60, s. 4, it is expressly provided, that in case a Jury shall find a defendant guilty, it shall be lawful for him to move in arrest of judgment, on such ground, and in such manner, as by law he might have done before the passing of that act; and the Court are not bound to presume, that the Jury, by their verdict, have found the fact, that the libel imputed dishonesty to the plaintiff.—The judgment of the Court below, therefore, must be—

Affirmed.

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

IN THE

Courts of Common Pleas

AND

Exchequer Chamber,

IN EASTER TERM,

IN THE NINTH YEAR OF THE REIGN OF GEORGE IV.

IN THE EXCHEQUER CHAMBER.

The TRUSTEES of the BRITISH MUSEUM *v.* PAYNE and FOSS.

[In Error.]

THIS was an action of debt. The plaintiffs, in the first count of the declaration, alleged, that the defendants, on the 10th *January*, 1825, were the publishers of, and did then publish, a certain book, entitled "*Flora Græca*," &c. (here the title of the book was set out), and which book was first published, advertised, and offered for sale, within the bills of mortality, on the day and year aforesaid, at the price of 12*l.* 12*s.*; which book was demandable under the statute 54 *Geo.* 3. The plaintiffs then averred, that the defendants did not, within one calendar month next after the day of publication, enter the title to the copy of the book, and the names and place of abode of the defendants,

A. having prepared a literary work, by his will directed it to be printed, and devised funds to his executors to defray the expenses of publication. After the death of *A.*, the work was published in parts, thirty copies being printed, for which there were only twenty-six subscribers (one part was sold), and the amount of the subscriptions being inadequate to pay the expenses of publication, the deficiency was defrayed by the executors out of the funds devised. The parts were not published at fixed intervals, but according to the state of those funds:—Held, that a part or number of a volume was not a periodical publication or book demandable by the public libraries, or *British Museum*, under the statute 54 *Geo.* 3, c. 156.

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so being the publishers thereof, in the register-book of the Company of Stationers at *Stationers' Hall*, as had been usual, before the passing of the statute, with respect to books the title whereof had theretofore been entered in such register-book; whereby the defendants forfeited, for their said offence, the sum of 5*l.*, and eleven times the price at which the book was sold: Whereby an action had accrued to the plaintiffs to demand and have from the defendants the said sum of 5*l.*, &c. The declaration contained several other counts, assigning breach of the statute. The defendants pleaded *nil debent*, on which issue was joined.

At the trial, before Mr. Justice *Bayley*, at *Guildhall*, at the Sittings after *Michaelmas* Term, 1826, it appeared, that the late Dr. *Sibthorpe*, having prepared the materials for the work in question, directed, by his will, that the work should be printed, devising to his executors certain funds for defraying the expenses of publication; that, after the death of Dr. *Sibthorpe*, the undertaking was carried on solely by the executors; that the work was published in parts, or numbers, thirty copies of each part being printed, for which there were only twenty-six subscribers, at twelve guineas each part; that the amount of this subscription being insufficient to defray the expenses of the publication, the executors paid them out of the funds devised for that purpose; that three of the parts or numbers were published before the passing of the statute 54 *Geo. 3*, c. 156, since which time six parts had been published by the defendants; that the parts or numbers were not published at stated periods, but at intervals of several years, according to the state of the funds. It was also proved, that one of the parts, beyond those subscribed for, had been sold. The part or number for which the present action was brought, was No. 9, being the first part of the fifth volume. The learned Judge told the Jury, that he was of opinion that the defendants were publishers within the meaning of the statute, but that the

part in question, No. 9, was not a book demandable under the act; on which the Jury found a verdict for the defendants. The counsel for the plaintiff then tendered a bill of exceptions, which having been sealed by the learned Judge, the question came on for argument in the Court of *Exchequer Chamber*, in error, in the course of the last Term, when—

Mr. *Patteson*, for the plaintiffs, premised, that the question turned solely on the construction of the 2d (*a*) and

(*a*) By which it is enacted, "That eleven printed copies of the whole of every book, and of every volume thereof, upon the paper upon which the largest number or impression of such book shall be printed for sale, together with all maps and prints belonging thereto, which, from and after the passing of the act, shall be printed and published, on demand thereof being made in writing to, or left at the place of abode of the publisher or publishers thereof, at any time within twelve months next after the publication thereof, under the hand of the warehouse-keeper of the Company of Stationers, or the librarian or other person thereto authorized by the persons or body politic and corporate, proprietors, or managers of the libraries following; *viz.* the *British Museum*, *Sion College*, the *Bodleian Library* at *Oxford*, the *Public Library* at *Cambridge*, the Library of the *Faculty of Advocates* at *Edinburgh*, the libraries of the four universities of *Scotland*, *Trinity College Library*, and the *King's Inns' Library* at *Dublin*, or so many of such eleven copies as shall be respectively demanded on behalf of such libraries respectively, shall be delivered by the publisher or publishers thereof respectively, within one month after demand made thereof in writing as aforesaid, to the warehouse-keeper of the said Company of Stationers for the time being; which copies the said warehouse-keeper shall, and he is hereby empowered to receive, at the hall of the said Company, for the use of the library for which such demand shall be made, within such twelve months as aforesaid; and the said warehouse-keeper is hereby required, within one month after any such book or volume shall be so delivered to him as aforesaid, to deliver the same for the use of such library: And if any publisher, or the warehouse-keeper of the said Company of Stationers, shall not observe the directions of the act therein, that then he and they so making default in such delivering or receiving the said eleven printed copies as aforesaid, shall forfeit, besides the value of the said printed copies, the sum of *five pounds* for each copy not so de-

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5th (*a*) sections of the statute 54 *Geo.* 3, c. 156, on the breach of the provisions of the latter of which the

livered or received, together with the full costs of suit, the same to be recovered by the person or persons, or body politic or corporate, proprietors, or managers, of the library for the use whereof such copy or copies ought to have been delivered or received; for which penalties and value such person or persons, body politic or corporate, is or are now hereby authorized to sue by action of debt, or other proper action, in any court of record in the United Kingdom."

(*a*) By which it is enacted, "That, in order to ascertain what books shall be from time to time published, the publisher or publishers of any and every book demandable under this act, which shall be published at any time after the passing of this act, shall, within one calendar month after the day on which any such book or books respectively shall be first sold, published, advertised, or offered for sale, within the bills of mortality, or within three calendar months, if the said book shall be sold, published, or advertised, in any other part of the United Kingdom, enter the title to the copy of every such book, and the name or names, and place of abode, of the publisher or publishers thereof, in the register-book of the Company of Stationers, in *London*, in such manner as hath been usual with respect to the books, the title whereof hath hitherto been entered in such register-book, and deliver one copy, on the best paper as aforesaid, for the use of the *British Museum*, which register-book shall, at all times, be kept at the hall of the said Company; for every of which several entries, the sum of two shillings shall be paid, and no more; which said register-book may at all seasonable and convenient times be resorted to and inspected by any person; for which inspection the sum of one shilling shall be paid to the warehouse-keeper of the said Company of Stationers; and such warehouse-keeper shall, when and as often as thereto required, give a certificate under his hand of every or any such entry; and for every such certificate the sum of one shilling shall be paid; and in case the entry of the title of any such book or books, shall not be duly made by the publisher or publishers of any such book or books within the said calendar month, or three months, as the case may be, then the publisher or publishers of such book or books shall forfeit the sum of five pounds, together with eleven times the price at which such book shall be sold, or advertised; to be recovered, together with full costs of suit, by the person or persons, body politic or corporate, authorised to sue, and who shall first sue for the same, in any Court of record in the United Kingdom, by action of debt, bill, plaint, or information, in which no wager of law, essoin, privilege, or protection, nor more than one imparlance, shall be allowed: Provided

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action was founded, and was simply, whether or not the number in question could be considered a *book* demandable by the plaintiffs, as trustees of the *British Museum*, by virtue of that act. The 1st section repeals the 5th section of the statute 8 *Anne*, c. 19, and the 6th section of the 41 *Geo.* 3, c. 107; and in order to arrive at a true construction of the 54 *Geo.* 3, it will be necessary to consider it with reference to those former acts. The 1st section of the 8th of *Anne* confers on the authors of books already printed, and who had not transferred their rights, the sole right of printing them for the term of twenty-one years; and on the authors of books not printed, the sole right of printing for fourteen years; and the 2d section, after reciting that many persons might, through ignorance, offend against the act, unless some provision were made, whereby the property in every such book as was intended by the act to be secured to the proprietor thereof, might be ascertained, as likewise the consent of such proprietor for the printing or re-printing of such book or books, might from time to time be known, enacts, that "nothing in the act contained shall be construed to extend to subject any bookseller, printer, or other person whatsoever, to the forfeitures or penalties therein mentioned, for or by reason of the printing or reprinting of any book or books without such consent as aforesaid, unless the title to the copy of such book or books thereafter published, shall, before such publication, be entered in the register-book of the Company of Stationers." The manifest object of that clause was, to protect the public against inadvertent piracies. And by the 5th section it was enacted, that *nine* co-

always, that in the case of magazines, reviews, or other periodical publications, it shall be sufficient to make entry in the register-book of the said Company, within one month next after publication of the first number or volume of such magazine, review, or other periodical publication; provided always, that no failure in making any such entry shall in any manner affect any copyright, but shall only subject the person making default to the penalty aforesaid under this act."

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pies of each book or books, upon the best paper, that, from and after the 10th *April*, 1710, should be printed and published, or reprinted and published with additions, should, by the printer and printers thereof, be delivered to the warehouse-keeper of the Company of Stationers for the time being, at the hall of the said Company, before publication made, for the use of the *Royal Library*, the libraries of the Universities of *Oxford* and *Cambridge*, the libraries of the four Universities in *Scotland*, the library of *Sion College* in *London*, and the library belonging to the *Faculty* of *Advocates* at *Edinburgh*; and which warehouse-keeper was required, within ten days after demand by the keepers of the respective libraries, or any person or persons by them or any of them authorized to demand the said copy, to deliver the same for the use of the aforesaid libraries." By that section, the printer, and not the publisher, was bound to deliver nine copies of every book to the warehouse-keeper of the Stationers' Company, for the use of the above libraries, whether demanded or not, and if the proprietor, bookseller, or printer, or the warehouse-keeper, should not observe the direction of the act, then he and they so making default in not delivering the said printed copies, were to forfeit, besides the value of the said printed copies, the sum of 5*l.* for every copy not so delivered, as also the value of the printed copy not so delivered. Although a party might omit to make an entry of the title of the copy of a book in the register-book of the Stationers' Company, as required by the 2d section of the act; yet the printer was bound to deliver the copies for the use of the libraries at all events, and the purpose of the entry was, merely to insure the protection of the copyright. Then came the statute 15 *Geo.* 3, c. 53, the 6th section of which, after reciting the fifth clause of the 8th of *Anne*, and that the provision of that statute had not proved effectual, but that the same had been eluded by the entry only of the title to a single volume, or of *some part* of such book or books so printed and published, or

reprinted and republished, enacts that "no person shall be subject to the penalties in the said act (of *Anne*) mentioned, for or by reason of the printing or reprinting, any book without the consent mentioned in the said act, unless the title *to the whole of such book*, and *every volume thereof*, be entered, in manner directed by the said act, in the register-book of the Company of Stationers; and unless nine such copies of the whole of such book or books, and every volume thereof, printed and published &c., as therein mentioned, shall be actually delivered to the warehouse-keeper of the said Company, as therein directed, for the several uses of the several libraries in the said act mentioned. That section is most material, as it clearly shews that the object of the Legislature was, first, the prevention of fraud, by requiring entry to be made of the title to a single volume, or part of a book, and secondly, for the protection of the public libraries. Then followed the statute 41 *Geo. 3*, c. 107, by which further rights were conferred on authors; and by the 6th section of which, it was enacted, that, in addition to the nine copies, then required to be delivered to the warehouse-keeper of the Stationers' Company, of each and every book which should be entered in the register-book of the said Company, one other copy should be in like manner delivered for the use of the library of the College of the *Holy Trinity* of *Dublin*, and one other copy for the use of the library of the Society of the *King's Inns*, *Dublin*, by the printer of every such book as should thereafter be printed and published, the title to the copyright whereof should be entered in the register-book of the said Company; and in the case of the University of *Cambridge* v. *Bryer* (*a*), the Court of *King's Bench* decided, on the construction of those statutes, that it was necessary for the printer of a book composed after the passing of the statute, 8 *Ann.* c. 19, and published for the first time after the composition,

(*a*) 16 East, 317.

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to deliver a copy to the warehouse-keeper of the Stationers' Company, for the use of the public libraries, notwithstanding the title to the copy of such book was not entered in the register-book of the said Company. That, therefore, shews that the Universities and public libraries were entitled to such copies of the present work as were published before the passing of the statute 54 *Geo.* 3, although no entry were made of the title; and the legislature did not thereby intend to leave such libraries with imperfect, or mutilated or unfinished copies.

The 8 *Ann.* c. 19, required the delivery of nine copies, one of which was for the use of the *Royal Library*. By the 41st *Geo.* 3, c. 107, two additional copies were required, for the use of the libraries of *Trinity College*, and the *King's Inns, Dublin*. By the 54 *Geo.* 3, c. 156, s. 2, the *British Museum* was substituted for the *Royal Library*, which had been presented by his late Majesty to that institution; and by the 2d and 3d sections, it is provided, that the copy of every book that shall be demanded by the *British Museum*, shall be delivered, of the best paper on which such work shall be printed. Before the passing of the statute 54 *Geo.* 3, the printer was bound to deliver eleven copies of every book published with a view to sale, to the Stationers' Company, for the use of the Universities and other public libraries; but now the publisher is required to deliver, on demand. It consequently became necessary that the libraries should have information given them when a work is published. In order, therefore, to ascertain what books are from time to time published, the 5th section of the statute, 54 *Geo.* 3, directs that the title to the copy of every book demandable under the act, shall be entered by the publisher at *Stationers' Hall*, within a certain limited period; and, to ascertain what books are demandable, it is necessary to refer to the second section, by which "eleven printed copies of the whole of every book, and of every volume thereof, are to be delivered by the

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publisher, within twelve months after publication. So the statute, 15 *Geo.* 3, c. 53, s. 6, requires the title to the copy of the whole of a book, and every volume thereof, to be entered; and, as it is recited in the commencement of that section, that the provisions of the statute of *Anne* had been eluded by the entry only of the title to a single volume, or of *some part* of such book so printed and published, it is clear that the legislature meant to refer to such books as were published in *parts*, and that entries should be made as each part was published. The time when such entries were to be made, under the former acts, was optional; but, by the 54 *Geo.* 3, they are required to be made within one month after the day on which any and every book demandable under the act should be first sold, published, advertised, or offered for sale. The 10th section enacts, that all actions and suits, for any offence that shall be committed against the act, shall be brought and sued out within twelve months next after such offence committed; and if a volume were to consist of five or ten parts, published quarterly, or, as in this case, at uncertain intervals, the last part being published long after the expiration of a year after the publication of the first, the act would be altogether nugatory, unless it receive this construction; for it could not be said that the work was first published when the volume was complete. The publication must apply to each separate part; if not, after the publication of an unlimited number of parts, by advertising Addenda as the last, which might never be completed, no copy could be demandable, as the volume might never be published. The common law right is restricted by the statute of *Anne*, by which every part must be considered as a book; otherwise, the first part published might be pirated, and the author or proprietor could not obtain an injunction. The duration of the copyright can only be estimated by an entry of each part at the time of publication, and if the part could not be demanded then, would it ever be demandable? Or, if it were not

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demandable, nor required to be entered at *Stationers' Hall*, would the author have any copyright in it? The proviso in the 5th section of the 54th *Geo.* 3, as to periodical publications, is in favour of the plaintiffs' demand; as the first number or volume is required to be entered, so that the public libraries may know when the succeeding numbers are demandable. So, when works are published at irregular, or uncertain intervals, it necessarily follows that the title of every part must be entered; for the proviso would be altogether unnecessary if the publisher were not bound to enter the title, until the whole volume were completed. If a work, consisting of more than one volume is published at different times, the title page of each volume must be entered separately, and no distinction can be drawn between a volume and a part of a volume published separately. Besides, the copyright of a work is not to run from the time it is completed, but from the publication of each part; and as every number of a magazine, review, or other periodical publication, is demandable on publication, no distinction can be drawn between a work coming out in numbers or in parts; but the entry is required to be made on the publication of each part, in order that the public libraries may be informed when they are entitled to demand it.

Mr. *Platt, contrà.*—The part or number in question was not a book demandable by the plaintiffs, under the 54 *Geo.* 3. It has been said that the object of the statute of *Anne*, in requiring the copy of the title of every book to be entered, before publication, at *Stationers' Hall*, was, to protect the public against inadvertent piracies; yet it was also the intention of the legislature to protect the copyright of authors and publishers; for the statute was expressly passed for the encouragement of learning. Taking the whole of the context together, it is quite clear, that the entry of the title was merely a condition precedent to the protection

of copyright. It has been further said, that the statute 15 *Geo.* 3, c. 53, s. 6, which requires the title to the copy of the whole of a book, and every volume thereof, to be entered, applies to the title of each volume of every book, or to such books as are published in parts; but that can only be taken to refer to an entry of such a title as would shew the nature of the whole of the work, and the number of volumes of which it was to consist. Although the piracy of part of a work, *viz.* one volume, would amount to an infringement of copyright, yet the only object of the legislature was, to require such an entry to be made as would inform the public of the size or nature of the work, and what was intended to be entered. Neither the word "part" nor "volume" is introduced in the 5th section of the 54 *Geo.* 3, and "the whole of the book, and every volume thereof," in the 6th clause of the 15 *Geo.* 3, clearly denotes the subject matter of the enactment, and shews to what it was intended to apply, *viz.* to the entry of the *whole* of the work; and the absence of the word *part*, in both these statutes, is of itself conclusive against the plaintiffs' demand; at all events, no penalty can attach for not entering a part or number of a volume till the whole volume is complete. It is true that a single sheet has been held to be a book (*a*); but that was a complete work of itself, and, therefore, within the meaning of the statute of *Anne;* and, as the act is highly penal in its consequences, it must receive a strict or limited, and not a liberal construction, regard being had to the object the legislature had in view at the time it was passed. Now, in order to ascertain what books shall be from time to time published, the 5th section of the 54 *Geo.* 3, c. 156, enacts, that the publisher of any and every book demandable under the act, shall, within one calendar month after the day on which any such book shall be first sold, published, advertised, *or* offered for sale, enter the title to the copy of every such book, and the name and place of abode of the

(*a*) See *Clementi* v. *Goulding*, 11 East, 244.

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publisher, in the register-book of the Stationers' Company. That section cannot be construed literally. The word *or* must be read as *and;* for a book may be advertised many months, or even years, before it is published; and it may be impossible for the author or publisher to know of how many volumes it may consist. No penalty can attach for not entering a work advertised, which may not be published until long after its announcement to the public; and perhaps may not be published at all. It has been assumed, that the *British Museum* is substituted for the *Royal Library;* which his late Majesty, who was a great patron of learning, and a subscriber to most of our valuable works, presented to that institution; but the *British Museum* has never been identified with the *Royal Library.* No such fact appeared in evidence at the trial; nor is it shewn by the statute itself. It must, therefore, be considered as if they were perfectly distinct; and, inasmuch as the *Museum* was not mentioned or alluded to in the former statutes, the trustees could not be entitled to such parts of the work in question as were published before the passing of the 54 *Geo.* 3; and, therefore, cannot claim those which have been published since, as they form a mere mutilated or imperfect portion of it. To bring the case within the meaning of the statute, it must also be shewn that the work was published for profit or gain; whereas it appears from the evidence, that it was published at an expense which far exceeded the sum that could have been obtained for it, either from the price attached to it, or the number of the subscribers. It is equally clear, that the work was not printed or published with a view to a profitable sale, but only for a circle of private subscribers; and, if a certain number of persons agree to defray the expenses of printing a certain work for their own use, it would not be a publication within the meaning of the statute; and it matters not that a few copies may be sold. But the part in question is not a book within the purview of the act, nor does it come within the mischief intended to be remedied or provided

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against, *viz.* the infringement of copyright, which it was the main object of the Legislature to secure to the authors of books, or their assigns. The 5th section of the 54 *Geo.* 3 was framed for the express purpose of ascertaining what books, which should thereafter be published, should be entered at *Stationers' Hall.* That seems to remove every doubt on the subject, as the word "book" cannot mean a single volume, but a distinct work. The same construction applies equally to the 2d section, which enacts, that eleven printed copies of the whole of every book, and of every volume *thereof, which,* from and after the passing of the act, shall be printed and published, on demand *thereof* being made of the publisher, at any time within twelve months next after the publication *thereof,* shall be delivered within one month after demand. That enactment can only apply to the whole book or whole volume. The word *thereof* in the former part of the sentence is co-extensive with "every book;" and if so, the book or volume only is demandable. So the relative *which* refers to the copies of every book, and must not be confined to each volume: so also the demand required to be made within twelve months next after the publication *thereof,* applies to a demand of the book, and not of a single volume, and much less of a part of a volume. Even the word "volume" is not to be found in the 5th section; and the part here demanded is not a volume, but merely a *fasciculus,* or part or portion of a volume. If the work might be said to be published, on the appearance of a first part, still it would not be complete, so as to be demandable under the statute, until the volume was published. It is found as a fact, that some of the numbers of this work were published before the passing of the statute 54 *Geo.* 3; and although volumes of a work may be printed at intervals, still, to bring them within the meaning of the act, the original work must have been commenced after it was passed; for the book demandable, is that which was originally entered and pub-

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lished. The work in question cannot be considered as a periodical publication, the numbers not being published at stated periods, but at intervals of several years; and the number now demanded has no title, as the title of the whole work, and the preface, were contained in the first part of the first volume, which was published long before the statute was passed. Although each part has a page denoting the volume and number of the work, yet that cannot apply to the entry which was required to be made of the whole; and although there may be several distinct title-pages, yet the entry of the first is sufficient. If the publication had commenced since the passing of the 54 *Geo.* 3, and were demandable under that statute, the publishers need only to have entered the title-page to the first part or number of the first volume; but, as the first part was published before the act was passed, they were not bound to make a separate entry of those published afterwards; nor could the plaintiffs demand a mutilated part of the work. As, then, this is not a work for sale or profit, or within the contemplation of the act, and as it was commenced before the statute was passed, and as the part or number demanded is not a book or volume, but might consist of one sheet only, and have no title-page, it need not, nor could it, have been entered at *Stationers' Hall*, and, consequently, it cannot be legally demanded by the trustees of the *British Museum*, nor by any other public library.

Mr. *Patteson*, in reply.—Although it is said that the title to the *parts* of a work need not, nor can, be entered at *Stationers' Hall*, yet the title required to be entered by the statute, does not refer to the title-page of a book, but to the copyright only, the word *copy* applying to the *right* to the copy of the book or work. By the 8th *Anne*, c. 19, the title to the copies of books must be entered, before publication, in the register-book of the Stationers' Company, and such title is vested in the author or publisher. It has also been said that the plaintiffs,

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as trustees of the *British Museum*, cannot claim those parts which have been published since the passing of the 54 *Geo.* 3, as they were not entitled to those which were published before; and, therefore, that they could not be entitled to demand a mutilated portion; but, if a part were delivered before the passing of the act, the publisher would be bound to deliver the parts subsequently published. Before the passing of the 54 *Geo.* 3, the printers were required to deliver eleven copies of every work, absolutely; but, by that statute, such only were to be delivered, as were demanded; and the title to the copy of every book demandable, is required to be entered within a certain time by the publisher. If he omit this, he is subject to a penalty. The statute 26 *Geo.* 2, c. 22, was passed for the purpose of purchasing the Museum of Sir *Hans Sloane* and the *Harleian* collection of manuscripts, and for providing one general repository for the better reception and more convenient use of the said collections, and of the *Cottonian* library; and trustees were incorporated by the name of the Trustees of the *British Museum*, whose authority was recognised by the statute 27 *Geo.* 2, c. 16, s. 3, by which it is enacted, that all acts done by seven of the trustees, present at a general meeting, shall be deemed valid. Although, if a limited number of persons were to subscribe to print a work for their own private use, it would not be demandable under the statute, yet here there was no limitation as to the number of subscribers, and it is immaterial whether it were a work of profit or not. The statute applies equally to books which are published, as to those which are sold, advertised, or offered for sale. A distinction has been drawn between a book and a volume; but, if the object of the 5th section of the statute 54 *Geo.* 3, be looked at, it is quite clear that it was to ascertain what books were demandable by the public libraries, as well as the time within which the title to the copyright should be entered at *Stationers' Hall*; and if it can be deemed sufficient to enter the title to the first part of a

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work only, the rights of the public libraries would be altogether defeated, as they would not know when the subsequent parts might be published, except in the case of regular periodical works, for which provision is expressly made by the statute.

Cur. adv. vult.

Lord Chief Baron ALEXANDER, on the 11th *February* last, delivered the judgment of the Court as follows:—

This was an action of debt, brought by the trustees of the *British Museum* against the defendants in error, for penalties given by the statute 54 *Geo.* 3, c. 156, s. 5; which act is for the encouragement of learning, and respects literary property. The 5th section requires, that the publisher of every book demandable by force of it, shall enter the title of such book, with the name and residence of the publisher, at *Stationers' Hall*, and endeavours to enforce obedience to this requisition, by imposing, for the neglect of it, upon the publisher, a penalty of 5*l.*, with eleven times the price of the book. The present action is brought for the recovery of those penalties. The first count of the declaration avers that the defendants in error, were, on the 10th *January*, 1825, the publishers of, and did then publish, a *certain book*, entitled "*Flora Græca.*" Then follows a long title of the book, which it is immaterial now to state. The count then avers the book to have been first published at the time mentioned, at the price of 12*l.* 12*s.*; states it to be a book demandable by the act of the 54 *Geo.* 3; and charges the defendants with neglecting to enter the title to the copy of the book, and their names as publishers, at *Stationers' Hall*. There are many other counts in the declaration; but as the opinion of the Court does not turn upon the form of the pleadings, it is not necessary to pursue them further. The defendants in error pleaded the general issue, and upon the trial a verdict was found in their favour. And upon that occasion the plaintiffs tendered a bill of exceptions to the learned Judge. The result of the evidence, as it appears from the

bill of exceptions, is, that the publication in question is part of a considerable work prepared by the late Dr. *Sibthrope*, and by his will directed to be printed; that funds to a certain extent were by the same will given to carry on the undertaking; that some of the numbers were published before the act in question was passed, that is, before *July*, 1814; that the defendants have of late years been the publishers; and that the number which is the foundation of this action, is called *No.* 9, being the first part of the 5th volume, that is, only a part of a volume. In the view which this Court takes of the question, these are the material facts. The learned Judge who tried the cause, Mr. Justice *Bayley*, stated to the jury his opinion to be, that the defendants were publishers, within the true intent and meaning of the act, of the number called *No.* 9; but that this *No.* 9. was not a book demandable by force of the statute 54 *Geo.* 3; and therefore that the evidence produced by the defendants was sufficient to bar the action. This opinion is excepted to by the plaintiffs in their bill of exceptions. It is averred that *No.* 9. was a book demandable by virtue of the act of Parliament: and, whether it be or be not, is the question which this Court is called upon to decide on the present occasion. Now, whether that which is confessedly not a book, nor even a volume, but a part only of a volume, be demandable by the act, depends upon the second section of the statute. This section, so far as it is necessary to state it, is in these words:—It enacts, "that eleven printed copies of the whole of every book, and of every volume thereof, and upon the paper upon which the largest number or impression of such books shall be printed for sale, together with all maps and prints belonging thereto, which, from and after the passing of the act, shall be printed and published, on demand thereof, to be made in writing, to be left at the place of abode of the publisher or publishers thereof, at any time within twelve months next after the publication

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thereof, under the hand of the warehouse-keeper of the Company of Stationers, or the librarian, or other person thereto authorised by the proprietors or managers of certain public libraries, shall be delivered by the publisher or publishers thereof respectively, within one month after demand made thereof in writing, to the warehouse-keeper of the said Company of Stationers for the time being." By this provision, the thing required to be delivered on demand, is, the whole of every book and of every volume thereof; and of this the non-feasance is made penal. This Court is of opinion, with the learned Judge who tried the cause, that the persons for whose benefit this provision was intended, have no right, by force of a provision so expressed, to demand from the publishers that which is neither a book nor a volume, but only a part of a volume.

We are of opinion, that we are to understand the legislature as having in this clause employed the words in their common and accepted sense, and that we have no right by a questionable subtlety to extend the construction of the words beyond their usual and natural import.

No inference favourable to the plaintiffs, as it appears to us, can be collected from the fifth clause, on which this action is immediately founded, and which requires the entry. So far as it respects publications of this kind, it is general, and speaks of book or books only, and when the two clauses are combined, the act appears to mean that a volume would come within the word book, but that a *fasciculus* cannot be said to be a volume. We are, as I understand, all clearly of opinion, that this is not a periodical publication within the proviso which respects works of that description. The previous acts of the 8th *Ann.* and the 15th and 41st of his late Majesty, *Geo.* 3, have been referred to as illustrating the clauses in question, and tending to sustain the view taken by the plaintiffs of this case. Those acts have been looked into, and do not appear in any manner to warrant the construction contended for.

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It has been asked if this *fasciculus* be not demandable, or whether it be not required, under a penalty, to be entered, and whether or not the author has any copyright in it. I answer, that is a different question, and, whichever way it be answered, would not rule the present. It has also been asked, if not now, will this *fasciculus* ever be demandable. I answer again, that question is properly left to be decided when it shall occur; but be that as it may, this *No.* 9, part of the 5th volume, was not demandable, nor required, upon the true construction of the statute, to be entered, at the time when this action was brought.

We are, therefore, all of opinion, that there should be judgment for the defendants, and consequently the judgment will be—

Affirmed.

HUNT *v.* ALEWYN and Another.

Wednesday, April 23d.

THIS was an action of *assumpsit*. The first count of the declaration stated:—That, before and at the time of the making of the promise of the defendants, the plaintiff was lawfully possessed of a certain bill of exchange, for a large sum of money, to wit, the sum of 6240 Florins, foreign money, and was of great value, to wit, of the value of 600*l.*, drawn by one *Frederick Baeyertz*, upon certain persons using trade and commerce at *Amsterdam*, in parts beyond the seas, under the name, style, and firm of Messrs. *A. Horstman & Co.*, and payable at a certain day then to come, to wit, on the 24th *December*, 1827, and, being so possessed thereof, he, the plaintiff, afterwards, to wit, on the 1st *October*, 1827, at the special instance and request of the defendants, delivered the said bill of exchange to them, to be by them, the defendants, negotiated and caused to be discounted for the use and benefit of the plaintiff, for certain com-

The plaintiff declared on a promise by the defendants, to pay over to him the proceeds of a foreign bill of exchange negotiated by them on his account: —*Held*, that he was not bound to produce the bill; but might give parol evidence of its contents.

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mission or reward to them, the defendants, in that behalf; and in consideration of the premises, and of such commission or reward, they, the defendants, undertook and promised the plaintiff to negotiate the said bill of exchange, and cause and procure the same to be discounted for the use and benefit of the plaintiff, and to pay to him the proceeds thereof, after deductiug such reasonable commission and reward as aforesaid, and the reasonable expenses attending such negotiation and discount, when they, after the discounting thereof, should be thereunto requested. The plaintiff then averred, that, afterwards, and after the delivery of the bill of exchange to the defendants for the purposes aforesaid, to wit, on the 2d *October*, 1827, they, the defendants, procured the said bill of exchange to be discounted, and received the proceeds thereof, amounting, after such deductions as aforesaid, to a large sum of money, to wit, the sum of 512*l.* 7*s.*; and assigned for breach—that the defendants did not nor would pay to the plaintiff the proceeds of the said bill of exchange, or any part thereof, with such deductions as aforesaid, or any part of such proceeds, although they were afterwards, and after the receipt of the proceeds of the said bill of exchange, to wit, on the 3d *October*, 1827, and often afterwards, requested by the plaintiff so to do; but that they kept and retained the same, contrary to their promise and undertaking.

The second count stated—That, in consideration that the plaintiff had delivered to the defendants a certain other bill of exchange for 6240 Florins, to get the same discounted for and on account of the plaintiff, for a reasonable reward to the defendants in that behalf, they promised the plaintiff to get it discounted on account of the plaintiff, and to pay him the proceeds thereof, when they, after getting the same discounted, should be requested. The plaintiff then averred, that although the defendants got the bill discounted for and on his account, and received

the proceeds thereof; yet that they did not pay such proceeds over to him, although requested so to do, after the receipt thereof, but that they still refused to do so. To these were added the common money counts, and the defendants pleaded the general issue.

At the trial, before Mr. Justice *Gaselee*, at *Westminster*, at the Sittings after the last Term, it appeared, that, on the 18th *September* last, the plaintiff, in company with *Baeyertz*, the drawer of the bill, called at the defendants' counting-house, when *Baeyertz* requested them to negotiate a bill of his for about 500*l.*, on Messrs *Horstman & Co.*, of *Amsterdam*. The bill not being accepted, the defendants refused to take it, when *Baeyertz* said, that he was going to *Amsterdam*, and that the plaintiff was to accompany him, and would return shortly and bring the defendants the bill accepted; and *Baeyertz* desired them, after negotiating it, to pay over the proceeds to the plaintiff. On his return from *Amsterdam*, the plaintiff handed the bill, accepted by *Horstman & Co.*, to the defendants, who agreed to negotiate it and pay the plaintiff the net proceeds. On the 2d *October*, the defendants negotiated the bill, and on that day they received a letter from a Mr. *Hutchinson*, claiming the amount from *Baeyertz*, the drawer; and in the afternoon of the same day they wrote a letter to the plaintiff, informing him that they had negotiated the bill for 6240 Florins, drawn by *Baeyertz* on *Horstman & Co.*, as *per* note at foot, in which certain charges for brokerage, stamps, and commission, were deducted. On the same 4th *October* the defendants received notice that an attachment out of the Lord *Mayor's* Court was laid on the effects of *Baeyertz* in the hands of the defendants, at the suit of Messrs. *Grazebook & Munro*, on which the defendants wrote to the plaintiff, informing him of it, and stating that the attachment was laid on the proceeds of the bill as being the property of *Baeyertz*. The amount sworn to by *Grazebook & Munro* was 1027*l.* On the 1st *November* a commission of bankrupt was issued against *Baeyertz*, and the defendants after-

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wards paid over the proceeds of the bill to the assignees, on being indemnified by them. The plaintiff's brother proved that he saw a bill in the plaintiff's possession, on his return from *Holland*, which answered the description of that mentioned in the defendant's letter of the 2d *October;* and *Baeyertz* swore that the bill was paid to the plaintiff for a *bonâ fide* consideration, and that he had no interest in it at the time it was negotiated by the defendants. But, as neither the bill nor an attested copy of it was produced, it was objected for the defendants, *first*, that parol evidence could not be received of its contents; and, *secondly*, that the attachment laid in the Lord *Mayor's* Court, on the proceeds of the bill, was a *primâ facie* answer to the action, in the absence of any proof that such attachment had been abandoned. The learned Judge, however, thought otherwise, and directed a verdict to be taken for the plaintiff, for the amount of the proceeds of the bill, reserving to the defendants leave to move the Court to set it aside, and that a nonsuit might be entered, on the grounds above stated.

Mr. Serjeant *Taddy*, now applied accordingly, and, in support of the *first* objection, submitted that the plaintiff ought either to have produced the bill or a notarial copy of it, as it was drawn on a house at *Amsterdam;* or that at all events the plaintiff should have shewn that he had used due diligence to procure it, or that it was lost; for, although it might have been in the hands of the acceptors, at *Amsterdam*, the plaintiff did not shew that he had made any application to them for it. The letter written by the defendants to the plaintiff, on the 2d *October*, did not state in whose favour the bill was drawn, or that the plaintiff had any interest in it, or that he was entitled to receive the proceeds. *Secondly*, that, as such proceeds were attached by *Grazebrook & Munro* as being the property of *Baeyertz*, for whom, in point of fact, the defendants negotiated the bill, they were not warranted in paying over its amount to the plaintiff; and, that, as he did not shew that the attach-

ment had been abandoned, he was not entitled to maintain this action.

Lord Chief Justice BEST.—I am of opinion that there is no pretence for either of these objections. This was not an action on the bill, but for a breach of contract, and the plaintiff has declared accordingly, and stated that he was possessed of a bill, which he delivered to the defendants to be negotiated or discounted by them for his use, and that the defendants undertook to do so on being paid a certain commission. The defendants, by letter, addressed to the plaintiff, admitted that they had negotiated the bill, and received its value, and yet refused to pay over the proceeds to him. It has been objected that the plaintiff ought to have produced the bill at the trial, but that was not necessary, as it was in the possession of the acceptors at *Amsterdam*, who had paid it, and the plaintiff might therefore treat it as a lost bill; and, consequently, parol evidence of its contents was admissible. It has been further objected, that the attachment on the proceeds of the bill in the hands of the defendants, as the property of *Baeyerts*, is an answer to the action; but the attachment is not evidence between the parties to this suit, as it was laid by strangers; and on *Baeyerts*, the drawer of the bill, being called as a witness, he stated that he had no interest in the bill at the time it was negotiated, but that he had given it to the plaintiff for a valuable consideration; and his testimony was not attempted to be repudiated or impugned. He, therefore, having shewn that the property of the bill was in the plaintiff, and the defendants having received it from him, and informed him that they had negotiated it, they were bound to perform their contract by accounting for or paying over the proceeds to him.

Mr. Justice PARK.—I am of the same opinion. It appears to me to be quite clear that the defendants could not

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compel the plaintiff to produce the bill. They admitted, by letter, that they had negotiated a bill drawn by *Baeyertz* on *Horstman & Co.*, of *Amsterdam*, which was sufficient to entitle the plaintiff to go into parol evidence of its contents. With respect to the attachment, I fully concur with what has fallen from my Lord Chief Justice.

Mr. Justice BURROUGH concurred.

Mr. Justice GASELEE.—Independently of the question on the bill, the plaintiff had a right to recover on the count for money had and received.

Rule refused.

Wednesday, April 23d.

FAIRLIE and Others *v.* PARKER and Others.

The plaintiffs had applied for and obtained a writ of *mandamus*, under the statute 13 *Geo.* 3, c. 63, s. 44, for the examination of witnesses in *India*, and the writ and depositions were returned to this country; but the defendants did not join in the application for the writ, nor examine or cross-examine witnesses under it; and the plaintiffs obtained a verdict:—Held, that they were not entitled to the costs attending the writ, or of the office copies of the depositions.

In an action brought to recover the balance of an account, the parties agreed that the amount should be referred to two arbitrators, who, in settling the balance due, were to be guided by the decision of a Jury, in regard of a certain cargo of cotton shipped by the plaintiffs, the cost of which formed one of the items. The Jury found that the plaintiffs were not entitled to charge the defendants with the cost of the cotton; and the arbitrators, after excluding such cost pursuant to the verdict, found a certain sum to be due to the plaintiffs. The prothonotary, on taxation, refused to allow the plaintiffs the costs of the trial which applied to the cotton:—Held, that he was right in so doing.

THIS was an action brought by the plaintiffs, merchants residing at *Calcutta*, to recover the balance claimed to be due upon the result of accounts of very considerable extent. The cause of action arose in *India*, and the transactions which took place between the plaintiffs and defendants, consisted in the defendants' consigning to the plaintiffs goods from *England*, for sale in *Calcutta*, and the purchase and shipment of goods, in return, to the defendants, in *London;* and also the procuring freight for the defendants' vessels. The action was brought in *Easter* Term, 1822. The declaration contained the common money counts, and also counts for work and labour and

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commission. In the same Term, the plaintiffs applied for and obtained a writ of *mandamus*, under the statute (*a*), for the examination of witnesses at *Calcutta*. Under this writ, many witnesses were examined at *Calcutta*, and the writ and depositions were returned to this country. The defendants did not, however, join in the application for the writ of *mandamus*, nor did they examine witnesses under it, or cross-examine the plaintiffs' witnesses.

The trial came on at the Sittings after *Hilary* Term, 1827. Previously thereto, an agreement was entered into between the attornies for the parties, that all matters pending between them should be settled by arbitrators, except in regard to a quantity of cotton, part of the cargo of a ship called the *Mary Ann*. This vessel had been sent out by the defendants to *Calcutta*, with orders to the plaintiffs to provide a return cargo, either on freight, or on the defendants' account, according to certain instructions forwarded to them in that behalf. The plaintiffs purchased and shipped a cargo; but the defendants refused to accept the cotton which formed a part of that cargo, or to be charged with the cost of it, on the ground that the same was not purchased and shipped according to the orders given by them for a return cargo. The question between the parties, was, whether or not the plaintiffs were entitled to charge the defendants, with the cost of the cotton. On the trial, the Jury found that the plaintiffs were not entitled to charge the defendants therewith. The arbitrators afterwards made an award, whereby, after excluding from the accounts the charge for the cost and shipment of the cotton, pursuant to the verdict of the Jury, they found that there was due to the plaintiffs, from the defendants, the sum of 1,230*l.* 14*s.* 6*d.* The following is a copy of the agreement between the parties; and pursu-

(*a*) 13 Geo. 3, c. 64, s. 44.

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ant to this agreement a verdict was entered for the plaintiffs for the sum stated in the award:—

"It is agreed between the parties, that the amount be referred to Mr. *J. H.*, and Mr. *J. B.*, and such third person as they shall appoint, or any two of them, who, in settling the balance due or payable to one party or the other, are to be guided by the decision of the Jury, in regard to the cargo of the *Mary Ann*. If the Jury find the plaintiffs have no claim on the defendants in respect of the cargo of the *Mary Ann*, then the verdict is to be taken, on the trial, for the defendants; but if the Jury find the plaintiffs have any such claim in regard to the cargo of the *Mary Ann*, then the verdict is to be taken for the plaintiffs. The arbitrators to have power to direct a verdict for the plaintiffs, if they find a balance due to the plaintiffs, although the Jury should find the plaintiffs have no claim in regard to the *Mary Ann*."

On taxing the plaintiffs' costs on the *postea*, the Prothonotary disallowed the costs of the writ of *mandamus*, and all costs attending the execution of it, and of the office copies of the depositions given in evidence. He also disallowed all costs which applied to the cotton by the *Mary Ann*.

On an admission of the above facts by the respective attornies of the plaintiffs and defendants, Mr. Serjeant *Spankie*, in the last Term, obtained a rule *nisi*, that the Prothonotary might review his taxation.

Mr. Serjeant *Bosanquet*, Mr. Serjeant *Taddy*, and Mr. Serjeant *Wilde*, now shewed cause. The only question at the trial being, whether the plaintiffs were entitled to charge the defendants with the cost of the cotton shipped by the *Mary Ann*, and the Jury having found that they were not, the Prothonotary exercised a sound discretion in disallowing all costs which were applicable to such cotton.

Besides, the arbitrators, by their award, excluded the plaintiffs' charge for the cost and shipment of the cotton, in conformity with the verdict of the Jury, and found that there was a certain sum due to them from the defendants, on a distinct and separate account. With respect to the disallowance to the plaintiffs of the costs of the issuing of, and attendant on, the execution of the writ of *mandamus*, it raises a question of novelty, and some difficulty, as the statute 13 *Geo.* 3, c. 63, s. 44 (*a*), under which the writ was issued, is silent as to costs. The 40th section, which enacts, that all parties concerned shall be entitled to take copies of depositions at their own costs and charges, relates only to the mode of procedure in cases of indictments and informations in the Court of *King's Bench*, in which no costs are given. As, therefore, the costs attending the issuing and execution of the writ of *mandamus*, were not provided for by the statute, and the rule for the examination of witnesses being silent as to costs, this Court has no authority to award them to the plaintiffs, at whose instance alone the writ was applied for and sued out; for the defendants sought for no benefit under it. This case may be considered as analogous to the examination of witnesses on

(*a*) By which, after reciting that his Majesty's subjects are liable to be defeated of their several rights, titles, debts, dues, demands, or suits, for which they have cause arising in *India* against other subjects of his Majesty; for preventing such failure of justice, it is enacted, "that when and as often as the *East India Company*, or any person or persons whatsoever, shall commence or prosecute any action or suit, in law or equity, for which cause hath arisen in *India*, against any other person or persons, in any of his Majesty's Courts at *Westminster*, it shall and may be lawful for such Court respectively, upon motion there to be made, to provide and award such writ or writs, in the nature of a *mandamus* or commission, as therein mentioned, for the examination of witnesses; and such examination, being duly returned, shall be allowed and read, and shall be deemed good and competent evidence, at any trial or hearing between the parties in such cause or action."

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interrogatories by commission; and in *Hullock on Costs* (*a*), it is said, that the costs of examining witnesses, whether at home or abroad, upon interrogatories, are always borne by the party obtaining the rule for such examination, and do not abide the event of the cause, unless so ordered by the Court; and the 44th section of the statute states the writ to be in the nature of a *mandamus* or commission.

Mr. Serjeant *Spankie*, in support of the rule.—The 44th section of the statute 13 *Geo.* 3, empowers the Courts at *Westminster* to award a writ in the nature of a *mandamus* or commission. These words have reference to a former part of the clause, *viz.* "the commencement or prosecution of any action or suit *in law* or *equity*," and, *reddendo singula singulis*, the word "*mandamus*" must be taken to refer to proceedings in an action at law, and "commission" to those in a suit in equity. The effect of the writ of *mandamus* is, that witnesses in *India* may be examined *vivâ voce*, as in a Court of law; and their answers are taken on paper, and returned to this country accordingly, and not as depositions. In the case of a commission, witnesses are always examined on interrogatories. Formerly, it was a great grievance that the proceedings in an action should be stayed until a bill of discovery was filed, or a commission issued from the Court of *Chancery;* and the intention of the legislature was, that those grievances should be remedied; for the express object of the 44th section was, to prevent a failure of justice; and it surely would be a great failure of justice, if a party applying for a writ of *mandamus* should be obliged to pay the whole of the expenses attending it, when the object of the statute was to place him in a better situation than that in which he before stood. In *Stephens* v. *Crichton* (*b*), it was held, that the party succeeding is not entitled to the costs of examining witnesses on interro-

(*a*) 2d Edit. 439. (*b*) 2 East, 259.

gatories before commissioners abroad, but that each party applying pays his own expenses, unless it be otherwise expressed in the rule; but Lord *Ellenborough* there said, that "the examination of witnesses on interrogatories, in any case, was a matter of indulgence and consent." So, in *Taylor* v. The *Royal Exchange Assurance Company* (*a*), it was decided, that, where a party obtains leave, by *consent*, to examine witnesses abroad, on depositions, he is not entitled to be allowed the expense of taking those depositions, in the taxation of costs, although he succeed; but here the plaintiffs had a right conferred on them, by statute, to apply for and obtain a *mandamus*, whether the defendants consented or not. The writ in the nature of a *mandamus*, which has been issued in this case, may be assimilated to a *subpœna*. It is issued for the express purpose that witnesses may be examined abroad as in this country. Formerly, the costs of bringing over a foreign witness to give evidence on a trial in this country, were not allowed; but, in the case of *Tremain* v. *Faith* (*b*), it was decided, that, where a witness was sent for from abroad, *bonâ fide*, for the purpose of the cause, and for no other, the plaintiff may be allowed the costs of bringing him over and sending him back, although he should have been sent for, and have arrived, before the commencement of the action; and the case of *Schimmel* v. *Lousada* (*c*), was there over-ruled. So here, the Court would have allowed the plaintiffs the costs of bringing over and detaining the witnesses examined in *Calcutta*, as well as the costs of their return; but the cheapest and most effectual mode to be adopted for all parties, was, to have them examined there under the writ of *mandamus*.—With respect to the disallowance of the costs which applied to the cotton by the ship *Mary Ann*, although the Jury found against the plaintiffs on that particular item; yet, as they succeeded on the reference, they are, by the terms of

(*a*) 8 East, 393. (*b*) 1 Marsh. 563; *S. C.* 6 Taunt. 88. (*c*) 4 Taunt. 695.

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the agreement, entitled to a verdict on the whole declaration, to the amount awarded by the arbitrators; and they are, consequently, also entitled to the general costs of the cause. In *Postan* v. *Stanway*, Lord *Ellenborough* said (*a*), that, "wherever a plaintiff succeeds on a trial in any part of his demand divided into different counts in his declaration, whether the defendants have pleaded one plea to all the counts jointly, or pleaded to them separately, and separate issues have been joined, on some of which he has succeeded; yet he has never been allowed costs on that part of the plaintiff's demand which has been found against the plaintiff;" and in *Hibbert* v. *Fox* (*b*), the Court refused to send a taxation back to the Prothonotary to tax for the defendant the costs of pleading *non assumpsit*, where the plaintiff, by succeeding on another issue, had entitled himself to the general costs of the cause; and here the plaintiffs have, in point of fact, succeeded, as, by the terms of the agreement, they are entitled to have a general verdict in their favour; and they are, consequently, entitled to the general costs of the cause.

Mr. Justice PARK (*c*).—This is an application on the part of the plaintiffs, for the Prothonotary to review his taxation, on the grounds that he has disallowed the costs of a writ of *mandamus* sued out by them for the purpose of examining witnesses in *India*, and of the office copies of the depositions given in evidence, and also the costs of the trial which applied to certain cotton shipped by the plaintiffs on board a vessel called the *Mary Ann*. With respect to the costs applicable to the cotton, there appears to me to be no ground to say that the Prothonotary has done wrong in disallowing them. The agreement by the parties, to a

(*a*) 5 East, 264. (*b*) 5 Taunt. 660.

(*c*) Previously to the argument, The Lord Chief Justice had left Court for Chambers.

reference, was most judicious. This may be assimilated to a case where a defendant obtains a verdict on one point, and all the others, except that found by the Jury, are left to arbitrators. The arbitrators here have found that 1,230*l.* were due from the defendants to the plaintiffs on another account, and they have excluded the charge for the cost and shipment of the cotton, pursuant to the verdict of the Jury. The Prothonotary, therefore, most properly disallowed such costs. With respect to the disallowance of the costs attending the issuing and execution of the writ of *mandamus*, I am also of opinion, that he acted rightly. It is admitted, that it was applied for and obtained by the plaintiffs alone, and that the defendants did not join in the application, nor examine or cross-examine any witnesses under it, nor take any part whatever in the proceeding. Formerly it appears, that the costs of examining witnesses on interrogatories, whether at home or abroad, were always borne by the party obtaining the rule for such examination. So, in *Stephens* v. *Crichton*, after notice of trial had been given and countermanded, it was *agreed*, that, as several of the witnesses on either side were going abroad, they should be respectively examined upon interrogatories, and that the depositions of either of the parties' witnesses, who were then abroad, should be taken before commissioners there; and it was held, that the party succeeding at the trial, was not entitled to the costs of examining his own witnesses upon the interrogatories, or of taking office copies of the depositions of the witnesses of the other party; and Lord *Ellenborough* observed, that, "however desirable it was that the taxed costs should really indemnify the party who was ultimately found to be in the right, yet it was necessary to keep a check upon the very great expense to which this might lead, and to incur which, the interest of unconscientious agents might afford a temptation; and that there was the less reason to break in upon the rule in that case, as the examination of witnesses on interrogatories in any case

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was a matter of indulgence and consent." The like doctrine was established in *Taylor* v. The *Royal Exchange Assurance Company*, where the Master, in taxing costs for the plaintiff, having allowed him the costs of examining witnesses abroad on depositions, to which the defendants, on a motion in Court, had *consented*, in order to save the expence of a commission; the Master reported to the Court, that he was satisfied that he had proceeded upon a mistake, and that when a party applies for this indulgence, which is consented to on the other side, he virtually undertakes to examine his witnesses on depositions abroad, at his own expence, and is not entitled to any allowance on the taxation of costs. It appears to me that the statute 13 *Geo.* 3, makes no difference in this respect. The preamble to the 44th section states, that its object was to prevent the failure of justice, his Majesty's subjects being liable to be defeated of their rights, for which they might have cause arising in *India* against other subjects; and although it has been said, that justice would be prevented by compelling the plaintiffs to pay the costs attending the writ of *mandamus;* yet the object of the Legislature was, to prevent tedious or circuitous proceedings in equity, or the expense of applying for a commission; to remedy which it is provided, that a writ in the nature of a *mandamus* or commission may be awarded for the examination of witnesses in *India*. The distinction taken between a *mandamus* and commission, *viz.* that the one refers to proceedings at law, and the other to those in equity, seems to me to be too refined. The Court may direct the writ to be issued at the instance of either party, and, as the statute is silent as to costs, the writ must be considered in the same light as if a commission had been applied for by the plaintiffs to examine witnesses abroad, and the defendants had consented; in which case the plaintiffs would not be entitled to costs, although they might eventually succeed.

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Mr. Justice BURROUGH.—The statute is altogether silent as to costs. They might have been engrafted on the rule for the examination of witnesses, or mentioned to the Court when the motion for the *mandamus* was made. The writ was issued, as a matter of course, on the *ex parte* statement of the plaintiffs; and if they had called upon the defendants to admit certain facts, and they had refused to do so, the plaintiffs might possibly have been entitled to costs. The writ may be assimilated to a commission, where the applicant pays his own costs, although he may eventually be successful. With respect to the disallowance of the costs relating to the cargo of cotton, I am clearly of opinion that the Prothonotary exercised a sound discretion.

Mr. Justice GASELEE.—It appears to have been the constant practice, long before the statute 13 *Geo.* 3 was passed, that the costs of examining witnesses abroad upon interrogatories, should be borne by the party obtaining the rule for such examination; and that statute does not empower us to give costs; neither can we lay down a rule different to that which has been so long established. The act was passed about fifty-five years since, and it appears that no case has been decided on it, as to the payment of the costs of the writ. With respect to the purchase of the cotton shipped by the *Mary Ann*, the Jury expressly found that the plaintiffs were not entitled to charge the defendants with it. That was the only point submitted to the Jury, and the arbitrators excluded it by their award, pursuant to the verdict. Such of the costs of the trial, therefore, as were occasioned by the cotton, were properly rejected.

Rule discharged.

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Thursday, April 24th.

ROBSON and Others, Assignees of JOHN GEORGE, a Bankrupt, *v.* ALEXANDER and LEVY.

By the 6 *Geo.* 4, c. 16, s. 92, it is enacted, "that, if the bankrupt shall not, within a certain period after the adjudication, give notice of his intention to dispute the commission, the depositions taken before the commissioners shall be conclusive evidence of all matters therein contained, in all actions at law brought by the assignees for any *debt or demand* for which the bankrupt might have sustained an action:"—Held, that trover is an action for a *demand* within the meaning of that section.

Examinations of parties before commissioners of bankrupt, are evidence in actions against them by the assignees, unless such examinations were obtained by imposition, or under duress.

THIS was an action of trover brought by the plaintiffs, assignees of one *George*, a bankrupt, to recover the value of certain cloths alleged to have been the property of the bankrupt, and to have been converted by the defendants, jointly, to their own use. The declaration contained two counts, the first stating the cloths to be the property of the bankrupt, and a conversion by the defendants before the bankruptcy; and the second, as being the property and in the possession of the plaintiffs, as assignees; both alleging a conversion by the defendants after the bankruptcy of *George*. The defendants pleaded the general issue, and gave the plaintiffs notice, under the 90th section of the statute, 6 *Geo.* 4, c. 16, of their intention to dispute the act of bankruptcy and the petitioning creditor's debt. At the trial, before Mr. Justice *Burrough*, at *Westminster*, at the sittings after the last Term, the plaintiffs, in order to establish the act of bankruptcy, and the petitioning creditor's debt, produced the depositions and other proceedings under the commission against *George*; when it was objected that the depositions could not be received in evidence, on the ground that an action of trover was not a *debt or demand*, for which the bankrupt himself could maintain an action, within the meaning of the 92d section of the statute (*a*).

A. purchased goods of *B.* for *C.*, who gave *A.* his acceptance for their amount. *C.* having become bankrupt, *A.* proved the acceptance under the commission, and afterwards returned the goods to *B.*, on which *C.'s* acceptance was destroyed. In an action of trover by the assignees of *C.*:—Held, that the Jury were warranted in finding that *A.* and B. had been guilty of a joint conversion.

(*a*) By which it is enacted, "That, if the bankrupt shall not (if he was within the United Kingdom at the issuing of the commission), within two calendar months after the adjudication, or (if he was out of the United Kingdom) within twelve calendar months after the adjudi-

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It also appeared, from the answers of the defendants, on their examination before the commissioners, to questions put to them by the solicitor of the plaintiffs, as assignees, that *Alexander* purchased the cloths in question of *Levy*, for the bankrupt, *George*, and paid for them by *George's* acceptance, which *Levy* proved under the commission, and that *Alexander* had since returned the cloths to *Levy*, on which the bill drawn by *Levy* upon and accepted by *George*, was destroyed. It was then submitted for the defendants, *first*, that the examinations before the commissioners were improperly received, as they did not relate to the act of bankruptcy or to the petitioning creditor's debt; and that they could not be produced in evidence against the defendants in this action; *secondly*, that the bankrupt himself could not have brought an action to recover the cloths, as they were never in his possession;—and consequently, that the plaintiffs had no right to demand them; and *lastly*, that at all events an action could not be maintained against the defendants *jointly*, there being no evidence of a *joint* conversion; and that there was no pretence to charge *Alexander*, as he had received no consideration for the goods which he returned to *Levy*, the vendor.

The learned Judge was of opinion, that the objection as to the depositions not being admissible in evidence, was entitled to little weight; and it being left to the Jury to say whether or not there was a joint conversion by the defendants, they found in the affirmative, and gave a ver-

cation, have given notice of his intention to dispute the commission, and have proceeded therein with due diligence, the depositions taken before the commissioners at the time of, or previous to, the adjudication of the petitioning creditor's debt or debts, and of the trading and act or acts of bankruptcy, shall be conclusive evidence of the matters therein respectively contained, in all actions at law, or suits in equity, brought by the assignees for any *debt or demand* for which the bankrupt might have sustained any action or suit."

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dict for the plaintiffs, for 196*l.* 13*s.*, the value of the cloths.

Leave having been reserved to the defendants to move to set aside the verdict, and enter a nonsuit, in case the Court should be of opinion that the objections made at the trial were well founded—

Mr. Serjeant *Adams* now applied accordingly. *First*, the word *demand* in the 92d section of the statute 6 *Geo.* 4, c. 16, relates to contracts only, and does not apply to an action for a *tort*. So the words "debt or demand" can only have reference to a debt or sum due to the bankrupt, and for which he might maintain an action. Here, the goods were never in the possession of *George;* and he never was in a situation to maintain any action for them. There was, at all events, no conversion by the defendants, until after the bankruptcy of *George;* and it is doubtful whether he was in a situation to claim the cloths from the defendants. *Secondly*, the examinations of the defendants under the commission were not receivable in evidence. They were interrogated or examined by the solicitor to the assignees, and not by the commissioners; and although, in *Smith* v. *Beadnell* (*a*), it was held, that, if a witness, on his examination before commissioners of bankrupt, answer questions to which he might have demurred, as subjecting him to penalties, his answers might nevertheless be used against him for all legal purposes, yet Lord *Ellenborough* there said, "A person examined before commissioners of bankrupt, may demur to all questions which would subject him to penalties; but, having unguardedly answered the questions put to him, his answers may be applied against him for all purposes to which they are legally applicable." Here, the parties ought to have been cautioned by the commissioners, not to

(*a*) 1 Camp. 30.

criminate themselves; and, though, in *Stockfleth* v. *De Tastet* (*a*), it was held, that an acknowledgment improperly extracted from a party on his examination by commissioners, although irrelevant to the bankruptcy, might be used as evidence against him; yet Lord *Ellenborough* said, that it might be a very good ground for applying to the Lord Chancellor to have the examination taken off the file of the proceedings under the commission, or to punish those who had abused the authority of the Great Seal, by examining the party before the commissioners with a view to the particular action; that if he were imposed upon when he signed the examination, or were under duress, he would not be bound by it. Here, although the oath was administered to the defendants before a competent tribunal; yet they were improperly examined by the solicitor to the commission, for the purpose of shewing either that the bankrupt or his assignees might maintain an action against them for the conversion of goods which had never been in the possession of the bankrupt. *Lastly*, there was, at all events, no evidence of a *joint* conversion by the defendants, as the cloths were merely delivered back by *Alexander* to *Levy*, from whom they were originally purchased.

Lord Chief Justice BEST.—Several objections have been raised to the verdict found for the plaintiffs; but I think neither of them is entitled to much weight. It has been said, that this is not a species of action which falls within the meaning of the 92d section of the 6 *Geo.* 4, c. 16. It is much to be lamented that greater precision was not used in framing that act, which, unless it be shortly amended, will prove a source of endless litigation.. I am, however, of opinion that this is an action for a *demand* within the meaning of the act, which must receive a favourable construction for creditors. The intention of the legislature

(*a*) 4 Camp. 10.

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was, to countenance actions brought by the assignees of bankrupts, and to discumber them from strict proof. I am of opinion, that the word *demand* in the 92d section includes a demand for goods, as well as a debt, within the terms and spirit of the act, and that trover is a species of action founded on such demand. It has been said, that it does not appear that the bankrupt himself could have sustained this action. If he could not, the case is not within the reach of the statute. It has been also urged, that the examinations of the defendants before the commissioners, were not receivable in evidence against them in this suit; but, as they were signed by the defendants, I think they might be used against them, although they might have been obtained improperly, unless the defendants could shew that they had been deceived or imposed on, or otherwise misled; for, as Lord *Ellenborough* said in *Stockfleth* v. *De Tastet*, "I cannot refuse to receive in evidence an examination signed by one of the defendants, however it may have been obtained." But it has been contended, that, even if the examinations of the defendants might be received, yet that they did not prove a debt or demand for which the bankrupt might have sustained an action. What are the facts?—The bankrupt purchased the goods in question from one of the defendants, a short time before his bankruptcy. There was no evidence to shew that the purchase was made in contemplation of bankruptcy. Both parties were bound by the sale; and neither of the defendants had a right to have the cloths back without the consent of the bankrupt. There was clearly a collusion between the two defendants; for the one delivered the cloths back to the other (the vendor), without the consent or knowledge of the bankrupt, who had given his acceptance for their amount. It is clear, therefore, that he might maintain an action against them: and although it has been said that there was no evidence of a *joint* conversion; yet, as it appeared that both the defendants col-

luded together, it was sufficient to warrant the Jury in finding the verdict they did.

Mr. Justice PARK.—With respect to the first or principal question, I am of opinion, that there is no ground to induce us to interfere to disturb this verdict. By the 92d section of the statute, the depositions taken before the commissioners are to be conclusive evidence of the matters therein contained, in all actions by the assignees for any *debt* or *demand* for which the bankrupt might have sustained any action, unless he give notice of his intention to dispute the commission; which he did not do in this case. Although it has been said, that a *demand* cannot apply to an action of *tort*, yet, in every action, there is either a debt due, or a compensation required or demanded; and there need not be a demand of a debt. A demand is more frequently made in trover than in any other species of action. With respect to the examinations of the defendants not being admissible in evidence against them—if, as was observed by Lord *Ellenborough*, in *Stockfleth* v. *De Tastet*, they were imposed on when they signed it, or were under duress, they would not be bound by it; and if those examinations were improperly obtained, it might be a good ground for an application to the Lord Chancellor. That, however, does not appear to have been the case. The question as to whether or not the defendants had been guilty of a joint conversion, was left to the Jury, and I think they have come to a right conclusion by deciding in the affirmative.

Mr. Justice GASELEE.—The declaration contains counts stating the cloths to have been the property of the bankrupt before his bankruptcy, and of the assignees since; and I have no doubt but that the bankrupt might have maintained an action against the defendants for the conversion. The examinations of the defendants were properly re-

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ceived in evidence against them, and were conclusive; and although it has been said, that, even if they were admissible, they did not shew that the bankrupt could have maintained an action against the defendants *jointly;* yet, as the two concerted together in the conversion of the goods, which had been sold by one of them to *George*, previously to his bankruptcy, and for which he had given his acceptance, there appears to me to be no ground for objecting to the verdict of the Jury.

Rule refused.

Thursday, April 24th.

The defendant held land under a lease from *J. S.*, and underlet a portion of it, at an *advanced rent*, to one *G.*, who built thereon, using the party-wall of the plaintiff:—*Held*, that the defendant was the owner of the *improved rent*, within the meaning of the building act, and liable to a moiety of the expense of building the party-wall:—*Held*, also, that the account or estimate required by the act to be given within *ten days* after the building of the wall, does not apply to the case of a new wall to a house having none adjoining it; but only where an old one is removed.

COLLINS *v.* WILSON.

THIS was an action of *assumpsit*, brought by the plaintiff, under the statute 14 *Geo.* 3, c. 78, to recover the sum of 70*l.* 13*s.* 2*d.*, being a moiety of the expense of building a party-wall. The *first* count of the declaration stated,—"That, after the making of the statute 14 *Geo.* 3, intituled, &c., to wit, on the 1st *December*, 1824, the plaintiff was lawfully possessed of a certain piece or parcel of ground, situate within the weekly bills of mortality, to wit, in the parish of *St. James, Clerkenwell*, in the county of *Middlesex*, and, at his own expense, had erected and built thereon a certain messuage or tenement, and had erected and built a certain party-wall, parcel of the said messuage or tenement, agreeably to the directions of the said act of Parliament; and that, having so erected and built the said messuage, &c., and the defendant then being the owner and occupier of a certain piece or parcel of ground situate within the weekly bills of mortality, to wit, in the parish aforesaid, and adjoining to the said messuage, &c., so erected and built by the plaintiff, and abutting thereupon, he, the defendant, afterwards, to wit, on the same day and year aforesaid, did begin to erect and build, and

did erect and build, and cause and procure to be erected and built, on the said last-mentioned piece or parcel of ground, a certain messuage or tenement of the same rate or class of building as the messuage or tenement first above mentioned, and did, for the purpose of erecting and building the same, cut into and make use of the said party-wall of the plaintiff, to wit, at, &c. aforesaid. The plaintiff then averred—that, at the time of the making use of the said party-wall, and cutting into the same, by the defendant, as aforesaid, *the defendant was the owner of, and entitled to, the improved rent of the said adjoining building* so erected and built as aforesaid, to wit, at &c. aforesaid, and that he, the plaintiff, did, as soon after the cutting into and using the said party-wall by the defendant *as conveniently might be*, to wit, on, &c. aforesaid, deliver and cause to be delivered to the defendant, a true account, in writing, of the number of rods in the said party-wall so cut into and made use of by the defendant, for which the defendant, *as owner of such adjoining building* as aforesaid, by virtue of the said act of Parliament, was liable to pay to the plaintiff a large sum of money, to wit, the sum of 100*l.* (there being no deductions to be made thereout, for old materials, or otherwise), and did then and there demand payment thereof from the defendant: By reason whereof, and by force of the said act of Parliament, he, the defendant, became liable to pay to the plaintiff the said sum of 100*l.*, within twenty-one days next after such demand thereof as aforesaid; and, that, being so liable, the defendant promised the plaintiff to pay him accordingly. Breach—non-payment of the said sum of 100*l.*, within twenty-one days next after demand.

The *second* count stated—That the defendant was indebted to the plaintiff in the sum of 100*l.*, for part of the expenses of building a certain other party-wall, built, at the expense of the plaintiff, agreeably to the directions of the statute, between a certain messuage or dwelling-house

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situate within the weekly bills of mortality, and certain other ground, there also situate, next to and adjoining the said party-wall, and which wall had been cut into and made use of by the defendant, who, before and at the time of cutting into and making use of the same, *was the owner of, and a person entitled to, the improved rent of such ground*, and that, being so indebted, he promised the plaintiff to pay. To these were added the common money counts. The defendant pleaded the general issue.

At the trial, before Lord Chief Justice *Best*, at *Westminster*, at the Sittings after the last *Trinity* Term, it appeared, that in 1816 the defendant had agreed to take, on a building lease, from the Marquis of *Northampton*, a large quantity of ground in the neighbourhood of *Spa-Fields*; that, in *April*, 1819, the plaintiff entered into an agreement with the defendant for the lease of a part of such ground, for the residue of the term, at the yearly rent of 20*l.*, on which, in the course of that year, or the early part of 1820, he erected the house, the party-wall of which is the subject of this action; that, on the 20th *April*, 1820, the Marquis of *Northampton*, by indenture of lease, demised the land, and all buildings there-after to be erected thereon, to the defendants, for ninety-five years and three-quarters, commencing from the 25th *March* preceding, at the annual rent of 5*l.*; that, on the 27th *July*, 1820, the defendant also entered into an agreement with one *Gubby*, to demise other part of the ground to him (adjoining the plaintiff's), on which he was to erect two messuages, for the whole term except ten days, at the annual rent of 20*l.*; that *Gubby* thereupon employed the defendant, a builder, to erect them, in doing which the plaintiff's wall was cut into or used; that, on the 30th *September*, 1820, by an indenture between the defendant and one *Goodwin*, reciting the indenture of lease from the Marquis of *Northampton*, of the 20th *April* preceding, and also the agreements with the plaintiff, and with *Gubby*, the defendant assigned to

Goodwin all the premises demised by the lease of *April* 1820, and all buildings since erected thereon, for the residue of the term, subject to the rent of 5*l.*, for the sum of 1014*l.*; and that, on the 17th *October*, 1822, *Goodwin* granted a lease to the plaintiff for the then unexpired term of ninety-three years and a quarter, at the annual rent of 20*l.*, in conformity with the agreement entered into by the defendant; as also another lease to *Gubby*, in pursuance of the defendant's agreement with him. It was also proved, that the house adjoining the plaintiff's, and built by the defendant for *Gubby*, was of the same rate or class of building as the plaintiff's; that the building was commenced in the beginning of *August*, 1820, and that it was roofed, or covered in, before the end of *September* in that year—during which interval the whole of the party-wall in question was used or cut into; that, in *December*, 1820, the wall was measured by the respective surveyors of the plaintiff and defendant, and the moiety of the expense estimated by them at 70*l.* 13*s.* 2*d.*, being at the rate of 15*l.* 15*s.* *per* rod; that a copy of the estimate was afterwards delivered to the defendant, and several applications made to him for payment; but that, on his eventually saying that he was merely employed by *Gubby*, as the builder, and *Gubby* also, in 1823, having refused to contribute, the plaintiff, on 15th of *June*, 1826 (and not before), served a copy of the following notice on the defendant:—

"In pursuance of a certain act of Parliament made and passed in the 14th year of the reign of his late Majesty, King *George* the Third, intituled, &c. I, *James Collins*, of, &c., do hereby demand of you payment of the annexed account (*a*), being an account of a moiety of the expense of building a certain party-wall, built by me, or by my order, and at my expense, and being parcel of the messuage or dwelling-house now occupied by me, situate,

(*a*) The estimate of the expense, as required by the Act.

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&c., and which said party-wall has been cut into and made use of by you, by your building against the said messuage or dwelling-house a certain other messuage or dwelling-house of the same rate or class of building.—Dated, &c.

"To Mr. *John Wilson.*" *James Collins.*"

The present action was shortly afterwards commenced. It was contended, on the part of the defendant, that *Gubby* was the person liable to the contribution, as being the owner of the *improved rent* at the time the plaintiff's wall was used; and it was also objected, that the notice under the act was not given in time, as the account or estimate ought to have been rendered within *ten days* after the party-wall was built (*a*).

His Lordship, however, was of opinion that the defendant

(*a*) By section 41, it is enacted—"That the person or persons at whose expense any party-wall shall be built agreeably to the directions of the act, shall be reimbursed by the owner or owners, who shall be entitled to the improved rent of the adjoining building or ground, and who shall, at any time, make use of such party-wall, a part of the expense of building the same, in the proportion after mentioned; that is to say, if the adjoining building, then erected, or afterwards to be erected, be of the same rate or class of building as, or superior to, the building belonging to the person or persons at whose expense the said party-wall was built; then the owner or occupier of such adjoining building or ground, shall pay one moiety of the expense of building so much of the said party-wall as such owner or occupier shall make use of; and, if the adjoining building then erected, or afterwards to be erected, be of an inferior rate or class of building, then the owner or occupier of such adjoining building or ground shall pay a sum of money equal to one moiety of the expense of building a party-wall of the thickness by the act required for the rate or class of building whereof such adjoining building shall be, and of the height and breadth of so much of the said party-wall or party-arch, as such owner or occupier shall make use of: and, in the meantime, and until such moiety, or other proportional part, of the expense of building such party-wall or party arch, be so paid, the sole property of such whole party-wall or party-arch, and of the whole ground whereon the said party-wall shall stand, shall be vested entirely in the person or persons, at whose expense the same

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was the owner of the improved rent, within the meaning of the statute, at the time the house in question was built, and that the objection as to the notice did not apply, as there was no person with whom the account or estimate of the expense of building the party-wall, could be left within the ten days after it was finished, according to the terms of the act, no adjoining house being then built; and he left it to the Jury to say, who was the owner or proprietor of the house adjoining the plaintiff's at the time it was begun to be built; or whether the defendant could be considered as having an equitable interest in it, so as to be considered the owner of the improved rent, until he assigned his interest to *Goodwin* on the 30th *September*, 1820. The Jury found a verdict for the plaintiff, for 36*l.* 13*s.* 3*d.*, being at the rate of 7*l.* 15*s.* *per* rod for the wall erected by him, according to the terms of the statute. Leave was then given to the

shall be built; and such moiety or other proportional part of the expense of building such party-wall or party-arch, shall be so paid to the person or persons *at whose expense the same shall be built, or in whom the property thereof shall be vested*, at the times hereinafter mentioned; that is to say, in respect of every such party-wall to any house or building, whereunto, at the time of building the same, no other house or building was adjoining, so soon as such party-wall shall be first cut into or made use of; and in respect of every such party-wall as shall be built against, or adjoining to, any other house or building, so soon as such party-wall shall be completely built and finished. And it is thereby directed, that the expense of building such party-wall shall be estimated after the rate of 7*l.* 15*s.* by the rod, for the new brick-work, deducting thereout after the rate of twenty-eight shillings by the rod, for the materials (if any) of so much of the old wall as did belong to such adjoining building or ground, and also after the rate of two-pence by the cubical foot for the materials (if any) of so much of the old timber partition as did belong to such adjoining building or ground; and that, within *ten days after such party-wall shall be so built, or so soon after as conveniently may be*, such first builder or builders shall leave, at such adjoining house or building, a true account, in writing, of the number of rods in such party-wall, for which the owner or owners of such adjoining building or ground shall be liable to pay, &c. &c."

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defendant to move to enter a nonsuit, in case the Court should be of opinion that the objections taken at the trial were well founded.

Mr. Serjeant *Wilde*, in the last *Michaelmas* Term, accordingly obtained a rule *nisi*, that this verdict might be set aside, and a nonsuit entered, or a new trial had; and submitted, that it was improperly left to the Jury to say, whether the defendant could be considered as the owner of the improved rent, from the time *Gubby's* house was begun to be built, until the day on which he parted with all his interest to *Goodwin*. It should have been left to them to say, whether the wall had been cut into or used by the defendant before that day; for, although the premises adjoining the plaintiff's house, might have been begun to be built, yet the liability to contribute only attaches on a party's using or cutting into the wall; and the defendant was employed to build the house for *Gubby*, to whom he had agreed to let the land on which it was built, for 20*l.* a-year. The case of *Peck* v. *Wood* (*a*) established the principle, that the owner of the *improved* rent, and not of the *ground* rent, is liable to pay the expenses of a party-wall, under the act; and the defendant cannot be considered as the owner of such *improved* rent, within the act. The house was built by him for *Gubby;* and the improved rent, which is the rent of the house when completed, belonged to *Gubby*, and the defendant was merely entitled to a *ground* rent. The rent of land demised on a building lease, can only be improved by the erection of buildings thereon, the owners or occupiers of which alone are liable to contribution. Besides, the defendant was not the party who was to derive an advantage from the wall; but *Gubby*, for whom the house was built. It would therefore be most unjust that the former should be li-

(*a*) 5 Term Rep. 130.

able to the expense of building it. In *Philp* v. *Donati* (*a*), it was decided, that, before an action can be brought to recover a proportion of the expenses of building a party-wall, the accounts prescribed by the 41st section of the act must be delivered, whether the house be occupied by the owner or by a tenant; and a formal demand of the money must be made twenty-one days before the action is brought. That section requires the account to be given within *ten days* after the completion of the wall; and here, as the wall was completed, and the estimate made, in *December*, 1820, but not given to the defendant until *June*, 1826, it was clearly too late. The estimate ought, at all events, to have been furnished to the defendant before he parted with his interest to *Goodwin*.

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Mr. Serjeant *Spankie*, and Mr. Serjeant *Storks*, now shewed cause. The wall in question was a maiden wall, both houses being new. By the 41st section of the statute 14 *Geo.* 3, the liability of the party who shall be entitled to the improved rent, attaches at the time the wall is first cut into or used; for that section directs that the proportional part of the expense shall be paid to the person at whose cost the wall is built, in respect of every such party-wall to any house, whereunto, at the time of building the same, no other house or building is adjoining, so soon as such party-wall shall be first cut into or made use of; and here, the defendant had used the wall before he parted with his interest in the house, as it was proved to have been covered in before he assigned it to *Goodwin*. Although the defendant built the house for *Gubby*, yet, as he was entitled, under the agreement he had entered into with him, to a beneficial and increased rent, *viz.* a rent of 20*l.* a-year, he must be considered as the owner of the improved rent, within the meaning of the act. When the plaintiff's wall was first cut into at the erection of the ad-

(*a*) 2 Taunt. 62.

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joining house, the defendant was the only person who could claim an improved rent, and to that he was clearly entitled under the agreement with *Gubby*. It was, therefore, properly left to the Jury, to say who was the proprietor of the house adjoining the plaintiff's, or to be considered as the owner of the improved rent, at the time that house was begun to be built, and the plaintiff's wall first cut into or used. At all events, the defendant must be considered as the owner of the improved rent, by relation. He originally took the ground under a lease from the Marquis of *Northampton*, at *5l.* a-year, for the purpose of building on it. He agreed to underlet part of it to the plaintiff, a stranger, at a reserved and increased rent, *viz.* *20l.* a-year, to which he was beneficially entitled. He was also entitled to receive the same sum from *Gubby*, at the time his house was begun to be built. If he had not agreed to demise to *Gubby*, there can be no doubt of his liability; and although he built the house for *Gubby*, he had not parted with his interest in the property until the assignment to *Goodwin*, when the wall of the plaintiff had been used, and the house adjoining roofed or covered in. In *Sangster* v. *Birkhead* (*a*), it was held, that, if a lessee of a house, at rack rent, underlet it at an advanced rent, he is to be considered as the owner of the *improved* rent; and here the defendant was entitled to claim an advanced rent from *Gubby*. In *Southall* v. *Leadbetter* (*b*), Lord *Kenyon* and Mr. Justice *Buller* seemed to be of opinion, that persons who take leases at small rents, and afterwards improve the estates, so as to increase their value, should be liable to contribution; and in *Beardmore* v. *Fox* (*c*), it was held, that, although the tenant had improved the house demised, the lessor of the premises at rack rent (there being no other person entitled to any kind of rent) was liable to contribute, and not the lessee. But those cases are dis-

(*a*) 1 Bos. & Pul. 303. (*b*) 3 Term Rep. 458. (*c*) 8 Term Rep. 214.

tinguishable from the present, as they relate to old party-walls, between two houses already built, or pulled down and rebuilt, and not to a wall where no other house was adjoining at the time the party-wall was cut into or made use of.—With respect to the objection as to the notice, none could, under the circumstances, have been required; nor could the estimate have been left at the *adjoining* house, within ten days after the party-wall was built, as there was no such house, nor any person liable on whom it could have been served. In *Philp* v. *Donati*, the plaintiff had taken down an old party-wall which stood between his own house and the contiguous house of the defendant, and built a new party-wall in the room of it. Here, however, no notice could be given till the adjoining house was built; and the statute does not absolutely require the estimate to be left within ten days, but as soon after as conveniently may be; and the plaintiff could not ascertain whether the defendant or *Gubby* was liable to contribute. The case of *Reading* v. *Barnard* (*a*) is decisive to shew that it was not necessary for the plaintiff to demand the exact sum, or the price fixed by the statute.

Mr. Serjeant *Wilde*, in support of the rule.—The question left to the Jury was, who was the owner or proprietor of the house adjoining the plaintiff's, at the time it was begun to be built, and not when the wall was first cut into or made use of; or, in other terms, who was the owner of the improved rent till the 30th *September*, 1820, when the defendant assigned his interest to *Goodwin;* whereas, it should have been left to them to say, who was the owner of the improved rent at the time the wall was first used or cut into. The defendant had then parted with his interest to *Gubby;* and, having been merely employed by him to build the house, he was not liable to be charged with the

(*a*) 1 Mood. & Malk. 71.

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expenses of erecting the wall; and the plaintiff should have made a demand on *Gubby* for contribution. Although *Gubby* took only an equitable interest under the agreement, yet the defendant's right ceased. In *Taylor* v. *Reed*, Lord Chief Justice *Gibbs* said (*a*): "If the plaintiff had shewn an agreement for a lease, I think she would have succeeded in bringing this within the case of *Peck* v. *Wood*;" and here there was such an agreement. In order to make the defendant liable, the plaintiff should have shewn, not only that he was the owner of the improved rent, but that he cut into or used the plaintiff's wall for his own benefit, as such owner; whereas he had ceased to be such owner, by virtue of the agreement with *Gubby*.—It has been said that the notice required by the 41st section of the statute does not apply, as there was no house adjoining the plaintiff's at the time the wall in question was built, nor any person on whom it could have been served; but, if it were not given within ten days after the completion of the wall, it ought to have been left within a reasonable time, or as soon after as conveniently might be; and here, the defendant having agreed to let the land to *Gubby* before the house was built, and assigned all his interest in it to *Goodwin* in *September*, 1820, the application or notice by the plaintiff, in *June*, 1826, was, at all events, too late; and more particularly so, as he must have known that the defendant had agreed to let the land to *Gubby*; and it must be inferred that he was aware of the nature of *Gubby's* interest, as he had actually applied to him to contribute to the expense of building the wall.

Lord Chief Justice BEST.—At the trial, I entertained considerable doubt as to the mode in which I should direct the Jury; for the statute is so obscurely worded, and its provisions so difficult of application, that it is impossible for a

(*a*) 6 Taunt. 250.

lawyer to understand it; and cases have been constantly occurring on its construction. I therefore stated my first impression, and, being by no means confident that it was correct, I gave the defendant leave to move to enter a nonsuit. I have since considered the case; and, if the dates be attended to, it appears to me to be perfectly clear. The plaintiff built his house in 1819. There was then no *house* on the adjoining property in which the defendant had an interest; nor was there any person to whom the plaintiff could deliver an account or estimate of the work, within ten days after the building of the wall in question, as required by the act. On the 20th *April*, 1820, the Marquis of *Northampton* granted to the defendant a lease of the land or ground on which the plaintiff's house was built, together with that adjoining, (which the defendant had previously agreed to take), for the term of ninety-five years, commencing from the 25th *March*, 1820, at the annual rent of 5*l*. The defendant then agreed to underlet to the plaintiff the ground on which his house stood, for the whole of the term, at the annual rent of 20*l*. On the 27th *June* in that year, the defendant entered into an agreement with *Gubby* to demise to him a part of the ground adjoining the plaintiff's house, on which two messuages were to be built, for the residue of the term, at the like annual rent of 20*l*. In *July*, therefore, the defendant was entitled to receive those rents, and so continued till the 30th *September* following, when, by indenture, reciting the lease from the Marquis of *Northampton* to the defendant, and the agreements with the plaintiff and *Gubby*, the defendant assigned all his interest in the premises demised by that lease, and all buildings since erected thereon, for the residue of the term of ninety-five years, subject to the rent of 5*l*. thereby reserved, and to the agreements recited, for the sum of 1014*l*. Although there was conflicting testimony as to the time when *Gubby's* house was begun to be built, yet it was clearly proved that

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it was roofed or covered in before the end of *September*, when the defendant assigned his interest to *Goodwin*. The defendant, therefore, was the owner of the improved rent, and entitled to receive it, at the time the plaintiff's claim in respect of the party-wall previously erected by him, attached, as the defendant had then stipulated with *Gubby* to receive an increased or improved rent from him, of the annual value of 20*l*. This case, therefore, differs from those to which we have been referred, where the amount of the improved rent had not been ascertained. At all events, the amount of the rent to be paid by *Gubby* was ascertained; and although he only took an equitable interest under the agreement, he was equally liable to the defendant for the payment of the rent, as though the legal interest had passed to him. It was not necessary that the defendant should be in the actual receipt of the rent; for, in *Stuart* v. *Smith* (*a*), the occupier of a house adjoining another, (between which a party-wall was proposed to be built), having asked a certain sum for his lease, was considered to be the owner of the improved rent within the act; and Lord Chief Justice *Gibbs* there said: "It has been decided, that where a tenant has a beneficial lease, the value of which has been considerably improved, he is to be considered as the owner of the improved rent, and therefore liable." That appears to me to be founded on reason and good sense; and, although it is extremely difficult to get at the true meaning of the statute, yet the intention of the legislature appears to be, that a party who has a mere interest in land, or is only the occupier, shall not be called on to contribute, but that, when its value is increased by the addition of houses erected thereon, from which he either receives, or is entitled to demand or receive, an improved rent, or a sum beyond what the *ground* is actually worth,

(*a*) 2 Marsh, 435.

he is liable to be charged. When, therefore, is he liable to be called on for contribution?—not when he may be in the actual receipt of the rent, but when the party-wall is first cut into or used; for he is immediately benefited by using the wall, which must be done before the house is completed or built, or the improved rent can be realized or received. As, therefore, the defendant could not have received the rent of 20*l.* a-year from *Gubby*, unless he had cut into or used the plaintiff's party-wall, I am of opinion that he must be considered as the owner of, and entitled to, the improved rent, and that he is consequently liable to contribute to the expense of erecting the wall, from which he has received a benefit.

It has been further objected, that the estimate or account of the expense of building the wall, or a notice thereof, should have been given by the plaintiff, within ten days after the wall was built, according to the provisions contained in the 41st section of the act. But I am of opinion that that clause does not apply to a case where the adjoining ground remains vacant at the time the wall was raised. If, indeed, *Gubby's* house had been building or built at the time the plaintiff's wall was erected, I should have thought the notice within ten days a condition precedent to his right to recover in respect of such wall; but the act is not confined to ten days after the building of the wall; but is in the alternative, within ten days, or *so soon after as conveniently may be.* That must be taken to apply to houses subsequently built, or where there are no adjoining buildings for which the owners would be liable to contribute; and it is for the Judge who tries the cause to consider whether the notice was given within a reasonable time, or as soon after as it conveniently might; for that will depend on the circumstances of each particular case. Here, I think, the plaintiff gave the defendant notice as soon as he reasonably could, as the latter and *Gubby* were endeavouring to trick him for six years previously; and, in

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point of fact, the plaintiff did not know to whom the notice ought to be given. The estimate applies to a party-wall only; and the immediate antecedent refers to an old party-wall, or a party-wall of an adjoining house already built; and, putting that construction on the act, there is a place at which the estimate or notice may be left within the ten days; but where there is no adjoining house, there is no owner or other person to whom the notice can be given. Taking it, therefore, that the notice required by the clause in question applies only to an old party-wall, or wall of a house already built, it is sufficient, in a case like the present, to give it as soon after the wall is built as conveniently may be, and that must depend upon particular circumstances.

Mr. Justice PARK.—When the motion for leave to enter a nonsuit was made, the main objection was, that it was improperly left to the Jury to say, whether, under the 14 *Geo. 3*, the defendant could be considered the owner of the improved rent, from the time the wall of *Gubby's* house was begun to be built, until the 30th of *September*, 1820, when he assigned all his interest to *Goodwin*. I have since looked at the statute with great care and attention, and am of opinion, that the question was not only properly left, but that, on the facts proved at the trial, the defendant was the owner of the improved rent within the meaning of the act. He having a lease from the Marquis of *Northampton*, of certain ground adjoining the plaintiff's house, for the term of ninety-five years from the 25th *March*, 1820, at the annual rent of 5*l.*, in the month of *July* following, entered into an equitable agreement with *Gubby* to demise part of the ground to him, at the yearly rent of 20*l.* Although he did not part with his absolute interest in the premises to *Goodwin* till the 30th *September*, 1820, yet in the mean time he was entitled to receive the rent of 20*l.* a-year from *Gubby*, whose house, at the time of the assignment to *Goodwin*, was roofed or covered

in; so that the party-wall in question must have been previously used; and by the terms of the 41st section of the statute, the contribution, in respect of the wall, was demandable, and ought to have been paid, when such wall was first cut into or made use of.—With respect to the estimate or notice required by the act to be given within ten days after the wall is built, I concur with my Lord Chief Justice in thinking that it does not apply to a case where there was no adjoining house at the time the wall was finished; and, consequently, that here it was sufficient for the plaintiff to give it as soon after the wall was built as conveniently might be, or within a reasonable time; which, under the circumstances, appears to me to have been done.

Mr. Justice BURROUGH concurred.

Mr. Justice GASELEE.—It has been admitted, that the wall in question was cut into or used between the months of *July* and *September*, 1820; and, during that period, the defendant was entitled to receive an improved rent of 20*l.* a-year, which he had reserved from *Gubby*. It therefore appears to me to be unnecessary to enter into the question as to the liability of a party who has a mere beneficial interest, or, as in *Taylor* v. *Reed*, where the defendant asked a certain sum for his lease; in which case Lord Chief Justice *Gibbs* thought that he was to be considered as the owner of the improved rent within the act. In *Lambe* v. *Hemans* (*a*), it was held, that the assignee of the lessee of premises, at a fixed rent, which he considerably improved, and rendered of greater annual value, was not the owner of an improved rent within the statute; but Lord Chief Justice *Abbott* there said, "It is to be observed, that the words of the act are, 'owner of the improved rent,' and not 'owner of the improved value;'" and here the defendant was the owner of the improved rent at the

(*a*) 2 Barn. & Ald. 467.

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time the wall was first used. I at first felt some difficulty as to the ten days' notice of the estimate, as required by the 41st section of the statute; but I do not think it applies to a case where there is no adjoining house or building at the time the wall was erected or built, but only to a party-wall between two houses erected at the same time, or to an old one pulled down and rebuilt. Here the plaintiff could not ascertain who might be the owner of the improved rent of the adjoining house at the time his wall was completed; neither was there any person with whom the estimate of the expense could be left; and although it has been said that the notice should have been given to *Gubby* when he entered into the agreement with the defendant; yet not he, but the defendant, was the owner of an improved rent at the time.

Rule discharged.

Friday, April 25th.

AXFORD, Assignee of CLUTTERBUCK, Esq. *v.* PERRETT.

A defendant in replevin having taken no proceedings in the suit for more than a year and a half after entering his plaint in the County Court:—Held, to amount to a breach of the condition of the replevin-bond, to prosecute the suit with effect and without delay, although judgment of *nonpros* had not been signed by the plaintiff.

THIS was an action brought by the plaintiff, as assignee of the sheriff of *Wilts*, on a replevin-bond. The declaration set out the condition of the bond, which was, that, if the defendant appeared at the then next County Court to be holden for the county of *Wilts*, on &c., and then and there prosecuted his suit with effect and without delay, against the plaintiff, for taking and unjustly detaining his goods and chattels, &c., the bond should be void. The plaintiff then alleged that the defendant did appear pursuant to the condition of the bond; but, notwithstanding such proceedings, he did not prosecute his suit in the condition mentioned, with effect, against the plaintiff, according to the tenor, effect, and meaning of the condition, but therein failed and made default. The defendant pleaded, *first, non est factum; secondly*, that the defendant did appear at the then next County Court for *Wilts*, and did then and there prosecute his suit with effect and without delay,

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against the plaintiff, according to the condition of the bond; and *lastly*, that the defendant duly appeared and prosecuted his suit in the condition mentioned, according to the form and effect of the condition in that behalf, and which suit was still pending and undetermined. The plaintiff joined issue on the *first* and *second* pleas; and replied to the last,—that the defendant did not prosecute his suit in the condition mentioned, according to the form and effect of the condition, in manner and form as in the last plea alleged.

At the trial, before Mr. Justice *Gaselee*, at the last Assizes for the county of *Wilts*, the County Clerk proved that the defendant entered his plaint on the 19th *July*, 1826, to which the plaintiff appeared on the 25th, being the next County Court; that no proceedings were taken by either party till *February*, 1827, when the replevin-bond was delivered up to the under-sheriff, to be assigned to the plaintiff; that the defendant had taken no step in the cause from the time of entering his plaint, until the 13th *February* last, when he applied to the witness to enter continuances, and proceed with the cause; which the latter refused, as, after the intervention of three full County Courts, without any proceedings by either party being taken, in a suit previously pending, he, by the practice of the Court, considered that the cause was settled or determined; and he had previously refused an application by the plaintiff's attorney to *nonpros* the plaint, for the same reason, *viz.* that he considered that the suit was no longer pending.

For the defendant—the predecessor of the County Clerk was called, who stated, that he held the office fifty years ago, and that during the whole of his practice, continuances of a replevin suit were entered from time to time in the County Court books, and that no such suit, of however long standing, was considered to be out of Court, without either a rule to discontinue, or *nonpros* entered, for that purpose, in full Court; and that continuances might be

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entered at any time till such rule was obtained, although he did not recollect that judgment of *nonspros* had been signed, when continuances had not been entered for so long a period as in the present suit.

The learned Judge being of opinion that the defendant had not prosecuted his suit without delay, the jury found a verdict for the plaintiff.

Mr. Serjeant *Wilde* now applied for a rule *nisi*, that this verdict might be set aside, and a verdict entered for the defendant instead thereof, or that the judgment might be arrested. *First*, the replication is bad in substance, as it does not traverse the allegation in the plea, that the suit was still pending; and, by the issue taken on that plea, it must be considered as if the suit was not determined. In *Brackenbury* v. *Pell* (*a*), it was held to be a good plea to an action on a replevin-bond, conditioned for the defendant to prosecute the replevin suit with effect, that the defendant did prosecute his suit, which was still depending and undetermined; and that such plea was not avoided, by replying that the defendant did not prosecute his suit as in the plea mentioned, but wholly abandoned the same, and that the suit was not still depending; without shewing how it was determined and ceased to depend. So here, the last plea stated that the suit was still pending, and the replication merely took issue on the fact that the defendant did not prosecute his suit according to the condition of the bond. That, therefore, was an immaterial issue, and the defendant is, consequently, entitled to have a verdict entered for him.—*Secondly*, it was impossible for the learned Judge who tried this cause, to say, what the practice of the County Court for *Wilts* might be, or whether, if no step had been taken in a suit, by the parties, after three County Courts had elapsed, they had been guilty of such delay as that the cause might be considered out of

(*a*) 12 East, 585.

Court, or determined. While a suit is in existence, it must be inferred that it has been prosecuted properly and effectually; and here it does not appear on the face of the record, that the suit was ended or determined. In the late case of *Elworthy* v. *Bird* (*a*), it was decided that a suit can only be discontinued in a legal mode, and that it is incumbent on a party who seeks to set up a discontinuance, to shew that the suit was determined according to law (*b*).

Lord Chief Justice BEST.—I am of opinion that there is no pretence for this motion. The real issue to be tried, was, whether or not the defendant had prosecuted his suit without delay. The Jury have found that he had not, and their verdict appears to me to be proper, and is conclusive. As to whether the pleadings are properly framed or not, I abstain from giving any opinion; but I am quite clear that there is no ground to arrest the judgment. The defendants should have demurred specially to the replication, as was done in *Brackenbury* v. *Pell;* but, from the evidence of the County Clerks, it is clear that the defendant had not proceeded according to the course and practice of the Court. If the plaintiff had replied that the cause was ended and determined, there would have been no difficulty; as, if a party sue out a writ and take no further proceedings for a twelvemonth, the cause is out of Court. The verdict is consistent with the issue as to whether the defendant had or had not been guilty of delay in prosecuting his suit.

Mr. Justice PARK and Mr. Justice BURROUGH concurred.

Mr. Justice GASELEE.—It was quite clear, from the evidence of the County Clerks, that the defendant had not

(*a*) 9 B. Moore, 430, *S. C.* 2 Bing. 258.

(*b*) See *Fanshawe* v. *Heard*, 1 Moore & P. 191.

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prosecuted his suit without delay. The plaint was entered in *July*, 1826, and no application was made by the defendant to enter continuances, until more than a year and a half afterwards; and the County Clerk then in office stated that he considered the practice to be—that a cause was out of Court after three Courts had elapsed without any proceedings being had; and although his predecessor said, that continuances might be entered at any time till a plaint was *nonprossed;* yet he admitted that he had never known a *nonpros* to be signed under such circumstances. The third plea was in effect double, as it alleged, *first*, that the defendant appeared and prosecuted the suit according to the condition of the bond; and *secondly*, that the suit was still pending: and the plaintiff could not traverse both. But the issue the jury had to try, was, whether or not the defendant had been guilty of delay in prosecuting his suit, and they were warranted by the evidence in finding in the affirmative.

Rule refused.

Friday, April 25th.

One of several joint-tenants may sign a warrant of distress, and appoint a bailiff to distrain for rent due to all, unless the others *expressly dissent.*

ROBINSON *v.* HOFFMAN.

THIS was an action of replevin for taking the plaintiff's goods. The defendant made cognizance as bailiff of *Henry Marchant*, the elder, *Samuel Cullum*, and *Stephen Cullum*, for 35*l.*, being one quarter's rent in arrear to them, under a demise by them to the plaintiff of a house, at the yearly rent of 140*l.*, payable quarterly. The plaintiff pleaded, *first*, *non tenuit; secondly*, no rent in arrear; and *lastly*, that the defendant was not bailiff, as in the cognizance alleged: on which issues were joined. At the trial, before Lord Chief Justice *Best*, at *Westminster*, at the Sittings after the last *Trinity* Term, it appeared, that the plaintiff held the premises in question under a lease, dated the 27th *July*, 1825, and executed by *Henry*

Marchant, the elder, *Samuel Cullum*, and *Stephen Cullum*, as the lessors, and in which they were described as surviving trustees under the will of *John Cullum*, deceased; and that the warrant of distress was signed by *Henry Marchant*, the elder, alone, as landlord of the premises, authorizing a distress for 24*l.* 10*s.* only.—For the plaintiff, *Samuel Cullum* was called as a witness, who stated, that he was applied to by *Marchant*, the elder, to sign the warrant of distress, but that he declined to do so, because he understood that the rent was due to a person of the name of *Willatts*; and that he, *Cullum*, had not since recognized or adopted *Marchant's* act, in authorizing the distress to be made on the plaintiff. It was then objected, that, as the warrant of distress was only signed by *Marchant*, the elder, it did not constitute the defendant the bailiff of the three lessors named in the cognizance. His Lordship, without intimating any opinion, directed a verdict to be entered for the plaintiff, reserving to the defendant leave to set it aside, and that a nonsuit, or a verdict for him, might be entered instead thereof, in case the Court should be of opinion that the objection was well founded.

Mr. Serjeant *Storks*, in the last *Michaelmas* Term, accordingly obtained a rule *nisi*, and submitted, that, as *Marchant*, the elder, *Samuel Cullum*, and *Stephen Cullum*, were described as surviving trustees in the lease, they must be considered as joint-tenants. And in *Pullen* v. *Palmer* (*a*), it was held, that one joint-tenant may distrain for the whole rent due, without any authority; but that he cannot avow alone, as in his own right, but must make cognizance as bailiff to the rest. So, in *Leigh* v. *Shepherd* (*b*), it was decided, that one of several co-heirs in gavelkind may distrain

(*a*) 3 Salk. 207; *S. C.* 5 Mod. 72.

(*b*) 5 B. Moore, 297; *S. C.* 2 Brod. & Bing. 465.

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for rent due to himself and his co-heirs, without an express authority from them to do so; and that an avowry by him, in his own right, and a cognizance, as the bailiff of the others, is sufficient, without averring any authority from them to distrain.

Mr. Serjeant *Wilde* now shewed cause. Although one joint-tenant may distrain alone, and avow in his own right, and make cognizance as bailiff of the others; yet he cannot appoint or depute a bailiff for them, nor authorize him to distrain for rent due to all, if all do not assent. In the *Year Book* (*a*) it is said, that, if a man take cattle, claiming property to himself as an heriot, and the lord afterwards agree to the taking for services due to him, yet the former cannot be said to be his bailiff at the time of the taking. The distinction is, whether or not the companions of the joint-tenant distraining, adopt, or dissent from, his act, at the time. At all events, the latter must make cognizance, as bailiff of the others, and not depute another to act in his stead. Another distinction may be taken, between a notice to distrain, and a warrant of distress, as the latter confers an express authority, under which the party is entitled to act; and, if the question were, whether he acted as bailiff or not, the production of the warrant would be sufficient evidence of his authority. In *Leigh* v. *Shepherd*, it was assumed that the co-heirs assented to the distress, as it only appeared at the trial that the defendant was *not authorized* by one of them to distrain for his proportion of the rent, but that he was authorized by the others. Here, however, *Samuel Cullum*, one of the lessors, expressly refused to sign the warrant of distress, or afterwards recognize the act of *Marchant*, the elder, who thereupon executed the warrant in his own name alone, by which the interests of the three lessors were severed; and he only authorized the defendant to dis-

(*a*) 7 Hen. 4, fol. 34, pl. 1; Vin. Abr. tit. "Bailiff," B. 1.

train for *24l.* 10*s.*; and if so, the cognizance for *35l.* cannot be supported.

Mr. Serjeant *Storks*, in support of his rule. If one joint-tenant may distrain for rent in arrear to him and his co-tenants, and avow in his own name, and make cognizance as bailiff to them, without their authority or assent, it must be assumed that he might do so although one might dissent; and it is immaterial whether the distress were made by him, or by his agent or bailiff. If so, the warrant of distress in this case does not negative the issue the Jury had to try. The defendant made cognizance, as bailiff of three joint-tenants, which the plaintiff, in his last plea in bar, denied; but he could not negative the title of the lessors; and, on the production of the lease, it appeared that the plaintiff held under three persons as surviving trustees, or joint-tenants; and payment of rent to one is equivalent to a payment to all. In *Leigh* v. *Shepherd*, the distress was made by one of several co-heirs in gavelkind, between whom the lands of the ancestor, by that particular custom, are equally divided; and in that case a distinction was taken between the rights of co-parceners, and joint-tenants, and it was admitted that the latter had legal rights and remedies of their own, as a joint-tenant has an entirety in the whole estate: and Lord Chief Justice *Dallas*, in delivering the judgment of the Court, adopted a *dictum* in the *Year Book*, 15 *Hen.* 7, fol. 17, *viz.* that if two men have a joint rent, and, the rent being in arrear, one distrain, and the tenant bring replevin, he ought to make avowry and cognizance as bailiff of his companions; and, because he has an interest in the rent, *his being bailiff is not traversable.* It would be highly inconvenient, if one of several joint-tenants could not distrain, although one only might dissent; for they are all clothed with the same rights. Here, however, there was no express *dissent* by *Cullum;* for he merely stated that he had declined

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signing the warrant of distress, as he had understood that the rent was due to another person.—With respect to the alleged variance, between the amount of the rent mentioned in the warrant of distress, and that named in the cognizance, it is perfectly immaterial, as a party may distrain for one sum and avow for another, and is not to be bound by a notice or warrant of distress.

Lord Chief Justice BEST.—When this objection was raised at *Nisi Prius*, I expressly abstained from giving any opinion. I, at first, considered that there was an *express dissent* by *Samuel Cullum* to authorize the distress; but I cannot now collect from his testimony, as it appears on my notes, that such was the case. He merely stated that he had declined to sign the warrant of distress on the plaintiff, as he understood that the rent was due to another person. It is, therefore, unnecessary to consider the effect of an express dissent, as *Cullum* left his co-tenant *Marchant*, the elder, in the same situation as the co-heir in gavelkind stood in *Leigh* v. *Shepherd;* to the authority of which I entirely subscribe, and by which this case must be governed.

Mr. Justice PARK.—I am of the same opinion. I concurred in the judgment of the Court, delivered by Lord Chief Justice *Dallas*, in *Leigh* v. *Shepherd*. We took unwearied pains in that case before we arrived at a decision; as we thought the question raised, which was most fully and ably argued, was one of doubt and moment; and we there held, that one of several co-heirs in gavelkind might distrain for rent due to himself and his co-heirs, without an *express authority* from them. And his Lordship said (*a*): "It is unnecessary to decide whether the authority which the law gives to each joint-tenant and parcener in point of

(*a*) 5 B. Moore, 306.

interest, to distrain and avow for himself and the rest, is such an authority as the others could not countermand, if they had thought proper so to do. It is sufficient that no such countermand appears here; nor is there any *express dissent* found as a fact in the case, but only an absence of express authority." So here, there was no express dissent, as the witness merely stated, in terms, that he had declined to authorize the distress, as he supposed the rent to be due to another.

Mr. Justice BURROUGH.—One joint-tenant may demand and receive the whole rent due, and give a discharge for it; and such discharge is good, and binding on his companions. So, one joint-tenant may distrain in his own name, but he must avow according to his title. Here, one of three surviving trustees under a will, authorized the defendant to distrain as his bailiff. The defendant made cognizance according to the title of the trustee: and there was no evidence of an express dissent by *Samuel Cullum*, the co-trustee.

Mr. Justice GASELEE.—If the distress had been made by *Marchant*, the elder, and the action had been brought against him, there would have been no doubt but he must have avowed in his own right, and made cognizance as bailiff of *Samuel* and *Stephen Cullum;* and, if he had authority to distrain for the two latter, it is immaterial whether the distress were made by himself or by his bailiff. The defendant has properly made cognizance as bailiff of the three. They were all beneficially interested; and, as one might distrain for the whole rent due, and there was no evidence of an express dissent by *Samuel Cullum*, this rule must be made—

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The defendant held premises under a tenant for life, on whose death possession was claimed, and rent demanded, by the heir-at-law of the devisor; whereupon the defendant wrote to the attorney of the heir-at-law, stating, that he held as tenant to *J. S.* (the husband of the tenant for life), in right of his wife; that he had never considered the claimant as the landlord of the house; that he should be ready to pay the arrears to any person who should be proved to be heir-at-law; but that he must decline taking upon himself to decide upon the claim made on him, without more satisfactory proof, in a legal manner:—Held, that this letter amounted to a disclaimer of the title of the heir-at-law; and that he might maintain ejectment against the tenant, without giving him a previous notice to quit.

DOE, on the demise of CALVERT, *v.* FROWD.

THIS was an action of ejectment, to recover possession of a house situate in *Serle Street, Lincoln's Inn Fields.* At the trial, before Lord Chief Justice *Best*, at *Westminster*, at the Sittings after *Trinity* Term, 1827, it appeared, that the lessor of the plaintiff claimed title to the premises, as heir-at-law of one *Mary Whittall*, deceased; who, being seised in fee, on the 9th *January*, 1799, devised them, for life, to one *Margaret Hodgson;* who afterwards intermarried with one *George Smallpiece. Mary Whittall* died in *September*, 1800. In *January*, 1806, *Smallpiece* and his wife demised the premises to one *Mitchell* for the term of twenty-one years from the 25th *December*, 1805, if *Margaret*, the wife, should so long live; and, in *January*, 1810, *Mitchell* assigned his interest in the lease to the defendant, who paid the rent to *Smallpiece* during the life of his wife. At her death, on the 10th *February*, 1826, the lessor of the plaintiff claimed to be entitled to the premises, as heir-at-law of *Mary Whittall*, the devisor, his great-aunt *ex parte paternâ;* and, on the 17th of *March* next, the following letter was sent by the attorney of the lessor of the plaintiff to the defendant.

"Sir,—I have called twice at your office without being fortunate enough to see you. In order that you may be fully informed of the right and title of my client, Mr. *John Calvert*, to the premises, No. 14, *Serle Street*, in your occupation, and late the property of Mrs. *Margaret Smallpiece*, deceased, I send you the particulars enclosed (a copy of the pedigree, and a statement of the claim of the lessor of the plaintiff), which, I trust, will fully satisfy you of his title, and that there will be no difficulty or objection to his receiving the rent which will be due on the 25th instant. I shall readily give you any further information or satisfac-

tion you may require, if you will make an appointment for me to call on you for that purpose. Yours, &c.

J. Mangnall."

On the 2d *November* following, the plaintiff's attorney wrote a second letter to the defendant, as follows:—

" Sir,—I am instructed by Mr. *John Calvert*, who is the heir-at-law of Mrs. *Mary Whittall*, deceased, to apply to you for payment of half a year's rent for the house you now occupy in *Serle Street*, due *Michaelmas* last, at 80*l. per annum;* and also the sum of 8*l.* 11*s.*, being the proportion of rent from the 10th *February*, 1826, to *Lady-day* last. Yours, &c.

J. Mangnall."

On the 4th *November*, the defendant returned the following answer:—

" Sir,—In answer to your letter respecting Mr. *John Calvert's* claim to the house which I hold as tenant to Mr. *Smallpiece*, in right of his wife, I beg to inform you, that I have not hitherto considered Mr. *John Calvert* as the landlord of the house in *Serle Street;* nor can I pay any rent to him, without the risk of being hereafter called upon to pay it over again to the person who may fancy, and perhaps prove, he has a better title. I shall be at all times ready to pay the arrears to any person who shall be proved to be either heir-at-law, or otherwise entitled to receive it; and, without wishing to dispute the connection by blood of Mr. *John Calvert* to Mrs. *Mary Whittall*, deceased, I must decline taking upon myself to decide upon that claim, without more satisfactory proof, in a legal manner. I am, &c.

E. Frowd."

On the will of *Mary Whittall* being produced in evidence, it was proved, that two of the attesting witnesses

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were dead; and a witness, who proved the hand-writing of the third, said, that he had left this country for *India*, as a medical student, about seventeen years since, and that his sister, who resided at *Bristol*, had said a short time since, that he was alive, and still in *India*, as an army-surgeon. The lessor of the plaintiff having proved his title as heir-at-law to *Mary Whittall*, it was objected, for the defendant, that this action could not be maintained, as he had not previously been served with a notice to quit; but his Lordship was of opinion that the defendant's letter amounted to a disavowal or disclaimer of the plaintiff's title, and dispensed with the necessity of such notice. The Jury accordingly found a verdict for the plaintiff. Leave, however, was reserved to the defendant to move to enter a nonsuit, in case the Court should be of opinion, that, under the circumstances, a notice to quit should have been given.

Mr. Serjeant *Wilde*, in the last *Michaelmas* Term, accordingly applied for a rule *nisi*, that this verdict might be set aside, and a nonsuit entered, or a new trial granted. *First*, as to a new trial—as it was proved that one of the attesting witnesses to *Mary Whittall's* will was alive, evidence of his hand-writing was not admissible. At all events, it should have been proved in what part of *India* he was, so that the defendant might have an opportunity of inquiring whether or not the statement made by the sister of the attesting witness was true. The will was the only evidence to shew that *Mary Whittall*, the devisor, was seised of the premises; which was not sufficient: nor was it shewn that *Margaret Hodgson*, the devisee, entered under it.—*Secondly*, as to a nonsuit—as the defendant held under an assignment of a lease from the devisee, to whose husband he had paid the rent as it became due, and as he merely stated in his letter, in reply to the demand for future rent, that he did not consider the lessor of the plaintiff as the landlord of the

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house, he could not be said to have done any act amounting to a disclaimer or denial of the title of the latter. In *Doe* d. *Williams* v. *Pasquali* (*a*), it was held, that a refusal to pay rent to a devisee under a will, which was contested, was not such a disavowal of his title as to entitle such devisee to maintain ejectment without giving a previous notice to quit. Besides, here, the attorney of the lessor of the plaintiff, by his letter of the 2d *November*, treated the defendant as his tenant; and, therefore, he was clearly entitled to a notice to quit.

Mr. Justice PARK, in the absence of the Lord Chief Justice, said, that, with respect to the first objection, the Court were of opinion, that it was of no weight, and that evidence of the hand-writing of the attesting witness, who was in *India*, was admissible; and, as to the objection that the will was not of itself sufficient proof of the seisin of the devisor, that the defendant's having paid rent to the husband of the devisee until her death, she having only a life-interest, must be considered conclusive as against him. The rule, therefore, was ordered to be confined to entering a nonsuit, on the point reserved.

Mr. Serjeant *Bosanquet*, and Mr. Serjeant *Storks*, now shewed cause. The letter written by the defendant to the attorney of the lessor of the plaintiff, in answer to that shewing his title to the premises and demanding rent, amounts to an express disavowal or denial of such title; and although it has been said, that, by the demand of rent on account of the lessor, the defendant had been recognized as his tenant; yet the latter asserted that he held as tenant to *Smallpiece*, who was the husband of the devisee for life; and that he did not consider the lessor of the plaintiff as the landlord of the house. As, therefore, the lessor of

(*a*) Peake's Ni. Pri. Cas. 196. Edit. 259.

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the plaintiff claimed as heir-at-law, and the defendant's term expired on the death of the tenant for life, under whom he held, the former was entitled to maintain this action, without giving a notice to quit. In *Doe* d. *Williams* v. *Pasquali*, Lord *Kenyon* said, that it had been held, that, if a tenant put his landlord at defiance, he might consider him either as his tenant, or as a trespasser; and in the latter case need not give him a notice to quit before he brought his ejectment: and here there was no acknowledgment by the defendant of the plaintiff's title; but, on the contrary, he stated that he held under *Smallpiece* in right of his wife, although he must have known that all his interest in the premises ceased at her death.

Mr. Serjeant *Wilde*, in support of his rule.—The lessor of the plaintiff could not, under the circumstances, treat the defendant as a trespasser, so as to entitle him to maintain this action without a previous notice to quit. There was, in point of fact, no legal demand of possession on the part of the lessor of the plaintiff; nor was there any absolute disavowal of his title by the defendant. The letter of the plaintiff's attorney, of the 2d *November*, recognizes the defendant as tenant, and demands half a year's rent. To this the latter replied, that he had not hitherto considered the plaintiff as his landlord; but that he should at all times be ready to pay the arrears to any person who should be proved to be either heir-at-law, or otherwise entitled to receive them. This case, therefore, falls within that of *Doe* d. *Williams* v. *Pasquali*, where the defendant said he was ready to pay his rent to any person who was entitled to receive it; but, doubting whether the will under which the devisee claimed, was duly made, he refused to pay him. So here, the lessor of the plaintiff might not have been the heir-at-law of Mrs. *Whittall*. The defendant stated that he did not wish to dispute his connection by blood to her, but that he would not decide on his claim without some satisfactory or legal proof. This, therefore,

did not amount to a repudiation of the plaintiff's title, but was a mere expression of doubt as to whether or not he was the heir-at-law of the devisee.

Lord Chief Justice BEST.—There are two answers to this objection. Let us first look at the situation of the parties. *Margaret Hodgson*, the devisee, had originally only a life-interest in the premises in question. On her marriage with *Smallpiece*, he took only a like interest for the life of his wife; at her death, his right was determined; and, as his interest ceased from that moment, the lessor of the plaintiff, as heir-at-law of the devisor, might treat the defendant as a trespasser. If the defendant had ever paid rent to the lessor of the plaintiff, a new tenancy would have been created; but, when the rent was demanded by his attorney on his account, the defendant replied, that he held as tenant to Mr. *Smallpiece*, in right of his wife; and, although he must have been aware of her death, which put an end to the title of all those who claimed to hold under her, yet he put the plaintiff to the expense of proving his title. His letter was an absolute repudiation or disclaimer of the plaintiff's title. If the defendant had held under the plaintiff's ancestor, the case of *Doe* v. *Pasquali* might have applied; but all his interest expired on the death of the devisee for life. Although I entertain the greatest respect for every thing that fell from Lord *Kenyon*, yet, as I have often before observed, a mere opinion of a Judge at *Nisi Prius*, who is called on to decide in the hurry of the moment, is entitled to but little weight; and I am seldom disposed to yield to it as an authority. Even if this case were parallel with that of *Doe* v. *Pasquali*, I should entertain the same opinion; because a notice to quit cannot be required by a party holding adversely; but only where there is a subsisting tenancy on both sides: nor is it necessary where the tenant does an act which amounts to a disavowal of the ti-

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tle of the landlord. When, therefore, the defendant's tenancy was put an end to by the death of the tenant for life, the heir-at-law had a right to treat him as a trespasser, and might maintain this action without giving him a notice to quit; and, as he disclaimed or denied the title of the lessor of the plaintiff, there appears to me to be no ground to disturb the verdict, to which the plaintiff was, in justice as well as law, entitled.

Mr. Justice PARK.—I do not rely upon the correspondence between the parties, as there was never any relation of landlord and tenant subsisting between the lessor of the plaintiff and the defendant. The interest of the latter in the premises was determined by the death of Mrs. *Smallpiece*, the tenant for life; and the heir-at-law might have immediately commenced an action of ejectment against him. But, in answer to the demand for rent, which was only made *sub modo*, the defendant said, that he did not consider the lessor of the plaintiff as his landlord, but that he held as tenant to another. He might have required time, or made a conditional offer; and although he stated that he held as tenant to *Smallpiece* in right of his wife, he must have known that his interest was determined by her death.

Mr. Justice BURROUGH was absent.

Mr. Justice GASELEE.—The case of *Doe* v. *Pasquali* might have applied, if the defendant had held under *Mary Whittall*, the original devisor, under whom the plaintiff claimed title as heir-at-law; but all the defendant's interest was determined on the death of Mrs. *Smallpiece*, the tenant for life, on which the interest of her husband also ceased. In *Doe* v. *Pasquali*, Lord *Kenyon* said, that, if a tenant put his landlord at defiance, he might consider him either as tenant or as a trespasser, and that, in

the latter case, he need not give a notice to quit before he brought his ejectment; and here the defendant expressly disavowed the title of the lessor of the plaintiff. This rule, therefore, must be —

Discharged.

ROBERT ROBARTS *v.* CHARLES ROBARTS.

Saturday, April 26th.

The plaintiff having lent the defendant a sum of money, took from him the following memorandum:— "I. O. U. 100*l.* *C. R.* 30 *July*, 1821." "*August* 17th, Received 50*l.* *C. R.*" The last item alone was *infra sex annos*:— *Held*, that it did not amount to an acknowledgment of the existence of the prior debt, so as to take it out of the statute of limitations.

THIS was an action of *assumpsit*, on a bill of exchange, drawn by the plaintiff upon and accepted by the defendant. The declaration contained a count on the bill, and the usual money counts. The defendant pleaded the general issue, and the statute of limitations. At the trial, before Mr. Justice *Burrough*, at *Guildhall*, at the Sittings after the last Term, the plaintiff's claim to the bill was abandoned, as it fell within the operation of the statute. The plaintiff then gave in evidence the following memorandum, in the defendant's handwriting:—

"I. O. U. one hundred pounds.

Chas. Robarts.

30th *July*, 1821."

"*August* 17th, Received fifty pounds.

Chas. Robarts."

The statute also applied to the above sum of 100*l.* acknowledged to be owing to the plaintiff on the 30th *July*, 1821. It was submitted, that, as the defendant had acknowledged that he had received 50*l.* on the 17th *August*, in that year, which was within six years before the commencement of the suit; and as such acknowledgment, signed by the defendant, was on the same paper as the admission of the previous debt of 100*l.*, it was sufficient to shew that that sum still remained due and unpaid, and was a recognition of the debt. It was also objected, that the memorandum was not admissible in evidence, as it had not a receipt stamp; but Mr. Justice *Burrough* referred to *Brookes*

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v. *Davies* (*a*), where it was decided, that a paper in the form of a receipt, if not given in evidence as a receipt, need not bear a stamp (*b*), and the learned Judge expressed himself of opinion, that the plaintiff was only entitled to recover the latter sum of 50*l.* contained in the memorandum, there being no evidence of a subsequent acknowledgment or admission by the defendant that the former sum remained due. Leave, however, was given the plaintiff to move that the verdict might be increased to 150*l.*, the amount of both the sums in the memorandum, if the Court should be of opinion that the admission of the receipt of the latter sum of 50*l.* amounted to an acknowledgment of the former remaining due, so as to take the case out of the operation of the statute.

Mr. Serjeant *Merewether* now applied accordingly, and submitted, that the defendant's having acknowledged the receipt of 50*l.* on the 17th *August*, which was within the six years, amounted to a recognition or an adoption of the first entry, of the 30th *July* preceding; and more particularly so, as the whole of the memorandum was in the hand-writing of the defendant, and on one piece of paper.

Lord Chief Justice BEST.—By the statute of limitations, all actions upon the case, other than for slander, must be commenced and sued within six years next after the cause of such actions, and *not after*; and it appears in this case that the first item in the memorandum signed by the defendant, viz. "I. O. U. one hundred pounds," was not written within six years. If there had been a subsequent acknowledg-

(*a*) 2 Carr. & Payne, N. P. C. 186.

(*b*) So in *Tomkins* v. *Ashby*, 6 Barn. & Cres. 541, the plaintiff, having deposited money in the hands of the defendant, received from him the following memorandum: "Mr. *T.* has left in my hands 200*l.*," it was held, that the memorandum was admissible in evidence without a stamp.

ment or promise by the defendant, by which the sum first lent might be set up, it would have the effect of taking it out of the operation of the statute. The question then is, has there been such a promise; or does the acknowledgment of the receipt of 50*l.*, at the foot of the memorandum, amount to such a recognition of the first sum of 100*l.* being still due, as to warrant a Jury to presume a promise by the defendant to pay it. There is, in point of fact, no such acknowledgment; and, although both items are written on the same piece of paper, the mere statement, by the defendant, of the receipt of 50*l.* on the 17th *August*, does not shew that the sum of 100*l.*, which the plaintiff advanced to him on the 30th *July* preceding, was still due. If the defendant had, in any terms, adverted to, or admitted, the fact that the 100*l.* had not been paid, it would have been sufficient to set it up; but, as no admission to that effect was contained in the paper, I am of opinion that the plaintiff was only entitled to recover the latter sum of 50*l.*, and consequently, that there is no ground for disturbing the verdict.

Mr. Justice PARK.—I am of the same opinion. Although both the items were written on one piece of paper, yet there was no acknowledgment by the defendant, that the former sum remained due, so as to take it out of the operation of the statute. The two items were perfectly distinct. If they had been added together at the bottom, the effect would have been altogether different.

Mr. Justice BURROUGH.—I thought, at the trial, that there must be, either a promise by the defendant to pay the first item, within the six years, as required by the statute, or such an acknowledgment as would take the case out of it. But here there was neither; nor was there any admission on the face of the memorandum, that the former

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sum of 100*l.* remained unpaid. The case of *Scales* v. *Jacob* (*a*), appears to be far stronger than this, and on that I acted at *Nisi Prius*. There, my Lord Chief Justice and Mr. Justice *Gaselee*, were of opinion, that, where a defendant promised to pay a debt when of ability, which promise was made three years after the original cause of action accrued, and within six years of the commencement of the action, it was incumbent on the plaintiff to prove that the defendant was able to pay.

Mr. Justice GASELEE concurring—

Rule refused.

(*a*) 3 Bing. 638.

Saturday, April 26th.

ANDREWS, Gent. One, &c. *v.* DALLY.

By a private act of Parliament, the expenses attending its passing were directed to be paid out of the tolls raised or levied, or to be raised, under it. The attorney who prepared and solicited the act, sued the clerk to the commissioners named in it, for the amount of his bill:—*Held*, that he was bound to shew that there were sufficient funds in the hands of the commissioners, which had been raised or levied by tolls or otherwise, to satisfy his demand.

THIS was an action brought by the plaintiff, an attorney, against the defendant, the clerk to certain commissioners named in an act of Parliament, passed in the *third* year of his present Majesty (c. lvii.), intituled "An act to establish a market for the sale of butcher's meat and other articles, and to repair and amend certain roads, in the town or tithing of *Bognor*, in the county of *Sussex*;" which act was amended by another act passed in the *sixth* year of his Majesty's reign (c. cxxxv.); to recover the amount of his bill of costs for business done by him in drawing, soliciting, and procuring the above acts to be passed.

The 6th section of the former act enacted, that no act of the commissioners should be valid, unless done at a general or special meeting, at which three commissioners at the least should be present. By the 15th section it was enacted, that the commissioners were to sue and be sued in the name of their clerk. The 25th section directed, that all tolls, du-

ties, &c., to be collected and levied under the act, should, in the first place, be applied in discharging the costs and expenses incurred in drawing, soliciting, and passing the act. The 36th, 45th, 46th, and 53d sections contained similar provisions. And the 2d section of the 6 *Geo.* 4, enacted, that the expenses of passing that act should be paid by the commissioners, out of the monies then raised or levied under the 3 *Geo.* 4, or out of the monies or funds that should be raised or levied by virtue of the 6 *Geo.* 4.

At the trial, before Mr. Justice *Burrough*, at *Westminster*, at the Sittings after the last Term, the plaintiff failed in proving that three commissioners had been present at a general or special meeting, previously to the commencement of the action, to allow or sanction the bill which was the foundation of the plaintiff's claim; and, the objection being urged for the defendant, it was answered that the 6th section of the 3 *Geo.* 4 applied only to acts done by the commissioners; and that the costs of preparing and passing the acts were expressly provided for. No evidence, however, was offered by the plaintiff, that any monies had been raised under either of the acts, by tolls or otherwise; on which it was objected, that the plaintiff should at least have shewn a retainer, duly authorized by a meeting at which three commissioners were present; and that there were, in the hands of the commissioners, funds levied under the acts, sufficient to defray the expenses of passing them. The learned Judge held the objection to be well founded, and directed a nonsuit; giving the plaintiff leave to move to set it aside, in case the Court should be of opinion that he was entitled to recover.

Mr. Serjeant *Merewether* now applied accordingly, and submitted, that, as the plaintiff did not, by this action, seek to charge the commissioners for any act done by them as such; and as both the acts of Parliament contained spe-

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cific directions for the payment of the costs and expenses of passing them; it was not incumbent on the plaintiff to shew a retainer authorized by three commissioners at a meeting, according to the provisions of the 6th section of the 3 *Geo.* 4; nor was it necessary for him to shew that the commissioners had sufficient funds in their hands to defray the plaintiff's charges for procuring the acts, as such charges had been expressly provided for, and were directed to be paid out of the monies first raised.

Lord Chief Justice BEST.—The plaintiff offered no evidence, nor was he prepared to prove, at the trial, that the commissioners had in their hands any funds which had been raised or levied under the acts, and out of which the expenses of soliciting and passing them could have been discharged. I am, therefore, of opinion that the action was not maintainable. It must be recollected that the commissioners act gratuitously, and are not personally liable. The 25th section of the 3 *Geo.* 4 enacts, that the tolls and duties to be levied under that act shall in the first place be applied in discharging the costs of passing the act; and the 2d section of the 6 *Geo.* 4 enacts, that the expenses of passing that act shall be paid by the commissioners, out of the monies then raised under the first act, or out of the monies to be raised by virtue of the second. It was not intended that the commissioners should pay those costs out of their own pockets. They acted as such on the faith of receiving tolls; and, until it was shewn that they had raised a sum sufficient to satisfy the plaintiff's demand, he could not be entitled to recover. He should have proved that they had enough money in their hands, arising from the tolls, to satisfy the *whole* of his demand. With respect to the objection as to the want of a retainer by three commissioners, at a meeting convened pursuant to the act, it is unnecessary to give any opinion.

Per Curiam. Rule refused.

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Monday, April 28th.

MURPHY and Another *v.* BELL.

A policy of assurance contained the following clause: "The ship, &c., goods and merchandizes, &c., for so much as concerned the assured and assurers in this policy, are and shall be valued at five tierces coffee, valued at 27*l. per* tierce, say 135*l. This policy to be deemed sufficient proof of interest.*"—Held, that the policy was void, under the statute 19 *Geo.* 2, c. 37, s. 1.

THIS was an action of *assumpsit*, on a policy of assurance. The declaration stated,—"That the plaintiffs, by the names and description of *J. & E. Murphy*, or as agents, as well in their own names, as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain, in part or in all, did make assurance and cause themselves and every of them to be insured, lost or not lost, at and from *London* to *Cork*, including the risk in craft to and from the vessel, upon any kind of goods and merchandizes, and also upon the body, tackle, &c., of and in the good ship or vessel called the *Zephyr*, beginning the adventure upon the said goods and merchandizes, from the loading thereof aboard the said ship, at *London*, upon the said ship, &c. and so should continue and endure her abode there, upon the said ship, &c.; and, further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandizes whatsoever, should be arrived at *Cork*, upon the said ship, &c., until she should have moored at anchor twenty-four hours in good safety; and upon the goods and merchandizes, until the same should be there discharged and safely landed. That the said ship, &c., goods and merchandizes, &c., for so much as concerned the assured and assurers in that policy, were and should be valued at *five* tierces coffee, valued at *27l. per* tierce, say 135*l. That policy to be deemed sufficient proof of interest.*" The declaration—after setting out the policy, and mutual promises, then averred—that, while the ship was in the River *Thames*, to wit, on &c., the said ship, having the said goods aboard thereof as aforesaid, was, by a peril, loss, and misfortune, to wit, by means of the great heat of the sun, and the dry weather, greatly damaged and opened in her seams, and between her planks, rendered leaky,

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and greatly filled with water, and the goods thereby then and there were wetted, damaged, and wholly spoiled, and rendered of no use or value to the plaintiffs. The defendant pleaded the general issue.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after *Easter* Term, 1827, the question was, whether or not the ship was sea-worthy at the time she left *London* for *Cork*. The Jury, after hearing much contradictory evidence on this point, which was fully summed up to them by the Lord Chief Justice, found a verdict for the plaintiffs.

Mr. Serjeant *Wilde*, in the last *Trinity* Term, moved for a new trial, on the ground that the verdict was against the weight of evidence; and also in arrest of judgment, on the ground that the policy, as set out in the declaration, was void, under the statute 19 *Geo. 2*, c. 37, s. 1 (*a*), it being agreed

(*a*) By which—after reciting that it had been found by experience, that the making assurances, *interest or no interest*, or, *without further proof of interest than the policy*, had been productive of many pernicious practices, whereby great numbers of ships, with their cargoes, had either been fraudulently lost and destroyed, or taken by the enemy in time of war; and that such assurances had encouraged the exportation of wool, and the carrying on many other prohibited and clandestine trades, which, by means of such assurances, had been concealed, and the parties concerned secured from loss, as well to the diminution of the public revenue, as to the great detriment of fair traders; and by introducing a mischievous kind of gaming or wagering, under the pretence of assuring the risque on shipping and fair trade, the institution and laudable design of making assurances had been perverted, and that which was intended for the encouragement of trade and navigation had, in many instances, become hurtful of, and destructive to the same,—for remedy thereof, it was enacted,—"That, from and after the 1st *August*, 1746, no assurance or assurances shall be made by any person or persons, bodies corporate or politic, on any ship or ships belonging to his Majesty, or any of his subjects, or on any goods, merchandizes, or effects, laden or to be laden on board of any such ship

that the production of the policy should dispense with further proof of interest.

Mr. Serjeant *Taddy*, in the course of the same Term, shewed cause against the rule for a new trial, when—

The Court said, that it could only be granted on payment of costs; and they ordered the rule to be enlarged, for the purpose of affording the parties an opportunity of coming to an amicable arrangement; which not having been effected—

Mr. Serjeant *Taddy*, on a former day in this term, shewed cause against the motion in arrest of judgment. The sole object of the legislature in passing the statute 19 *Geo. 2*, was, to prevent gaming by means of wagering policies, where the party insuring has, in point of fact, no interest to insure. But the policy in question does not fall either within the spirit or the letter of the act; for it distinctly appears that the plaintiffs had an insurable interest. It is quite clear that they had goods on board, as it was stipulated that they should be valued at five tierces coffee, valued at 27*l. per* tierce. The plaintiffs, therefore, sought to be indemified in respect of an existing interest; and the clause immediately following the valuation, *viz.* " this policy to be deemed sufficient proof of interest," must be taken to mean that the policy should be proof of *the amount* of the interest, or of the value of the goods insured. It is in effect a valued policy; and does not dispense with proof of the existence of an insurable interest. In *Grant* v. *Parkinson* (*a*), it was held, that profits expected to arise from a cargo of goods might be insured; and the policy in that case contained a clause, stipulating, that, " in case

or ships, *interest or no interest*, or *without further proof of interest than the policy*, or by way of gaming or wagering, or without benefit of salvage to the assurer; and that every such assurance shall be null and void to all intents and purposes."

(*a*) Park on Insurance, 6 Edit. 354; *S. C.* 6 Term Rep. 483, n.; 3 Bos. & Pul. 85, n.

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of loss, the profits should be valued at 1000*l.*, without any other voucher than the policy:" and it was insisted that this rendered the policy void, as well within the letter as within the spirit of the act. The point was saved by Lord *Mansfield*, who, after argument in banc, said: "On the construction of the act, it has uniformly been held, that a valued policy is not void. It is incumbent on the plaintiff to prove some interest; but it is not necessary to go into the whole value. The meaning of the policy is, not to evade the act of Parliament, but to avoid the difficulty of going into an exact account of the *quantum*. I cannot distinguish it from a valued policy; there is no pretence for saying it is a wagering one." That case is far stronger than the present. There, the insurance was effected on *expected* profits; whilst here, the coffee was on board; and it was agreed to be valued at a certain price *per* tierce, in order that the plaintiffs might not be compelled to go into the evidence of the value: but they were still bound to prove that they had an interest in the goods insured. So, in *Da Costa* v. *Firth* (*a*), where an insurance was made upon any of the packet-boats that should sail from *Lisbon* to *Falmouth*, or such other port in *England* as his Majesty should direct, for one year, upon any kinds of goods and merchandizes whatsoever; and it was agreed that the goods *should be valued at the sum insured on such packet-boats without further proof of interest than the policy;* it was held to be an exception out of the statute 19 *Geo. 2*, and a mixed policy, *viz.* partly a wager-policy, partly an open one; and a *valued* policy, and fairly so, without fraud or misrepresentation: and therefore, that, a loss having happened, the assurer was entitled to recover. So here, as this was not a gaming or wagering policy, but in the nature of a valued policy, it does not fall within the spirit of the act; and even assuming that it did, it does not come within the words or letter of the statute, which only avoids

(*a*) 4 Burr. 1966; *S. C.* Park on Insurance, 6 Ed. 357.

assurances made " without further proof of interest than the policy:" whereas, here, the words are, " this policy to be deemed *sufficient* proof of interest;" and such interest applies only to the *valuation* of the coffee, or the *amount* of the plaintiff's interest therein. If a particular form of conviction be given by statute, the exact words must be followed, and the slightest deviation will render it void. So, here, the words of the statute must be taken literally, and if the clause, that the policy was to be deemed sufficient proof of interest, be confined to the proof of the *value* of the coffee, it is a *bonâ fide* policy, and does not fall within the meaning of the statute.

Mr. Serjeant *Wilde*, in support of the rule.—The object of the statute was, to prevent insurances which had no actual reference to trade or commerce; and the legislature thought it necessary to check gaming or wagering policies, and to fix, by positive rules, what property a party might be permitted to insure; and if it could be made to appear that the interest proved was merely to cover a wager, in order to evade the statute, there can be do doubt but that such a policy would be void. The statute was not passed to remedy speculative evils; but to prevent pernicious practices, or political offences; and it expressly enacted, that no assurance should be made on ships or goods, " without further proof of interest than the policy." That must be taken to refer, not to the *amount* or *value*, but to the *existence of interest;* and the Courts have been anxious to give full effect to that object. It is not necessary that the precise form of words contained in the act should be used; but if a policy fall within the meaning of the statute, it is void to all intents and purposes; and the intention of the parties must be looked at. Even an insurance on a *ship* is void, if no further proof of interest be required than the production of the policy. Although it has been said that the clause in question must be taken to apply to the *valuation* of the coffee, or *amount* of

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the plaintiff's interest, yet the word *interest* is a technical expression, when used in the body of a policy, and must be taken in its usual and accustomed sense, or according to mercantile acceptation; and, if so, it must refer to the thing insured, as well as to its amount or value. The subject-matter of valuation forms a complete and independent clause in a policy. In *Grant* v. *Parkinson*, the policy was a *valued* policy, as it was declared, that, in case of loss, the profits should be valued at 1000*l.*; and the basis of the insurance was, the profits expected to arise on a cargo of molasses belonging to the plaintiff, who had a contract with government, to supply the army with spruce beer; and it was not to be destined to any particular place. The policy, therefore, was not meant to evade the statute, but merely to avoid the difficulty of going into an exact account of the *quantum* or value; not of the *existence* of an *interest* in the thing insured. In *Da Costa* v. *Firth*, the Court decided that the policy was good within the exception of the statute; which says (*a*), that policies in a particular form shall be void, except on effects from any port in *Europe* or *America*, in the possession of the Crowns of *Spain* or *Portugal*.

Cur. adv. vult.

Lord Chief Justice BEST now delivered the judgment of the Court as follows:—In the argument of the plaintiffs' counsel, it has been assumed, that the *sole* object of the statute 19 *Geo. 2* was, to prevent gaming under the pretence of insuring against the perils incident to navigation. On this assumption, he has insisted, that, if it appear not that a policy is a gaming policy, and the precise words specified in the act be not used, the case is not within the statute. The preamble of the act shews that gaming was the least of the evils that the Legislature proposed to remedy. Adventures, on which gambling policies might be made, that were not likely to be undertaken for the

(*a*) Section 3.

other purposes which it was the object of the statute to prevent, are exempted from its operation. The preamble states, that policies of insurance, with clauses of *interest or no interest*, or such as, in case of loss, *made the policies sufficient proof of interest*, were used to protect persons who were carrying on illegal traffic, and were made the means of profiting by the wilful destruction and capture of ships. Privateers, which carried no cargoes, and the crews of which were composed of more persons than it was safe to trust with the secret that the ships were to be wilfully destroyed, or purposely exposed to capture—ships going to the territories of *Spain* or *Portugal*, which were not likely to export wool (the exportation of which was, in *George the Second's* reign, the thing most dreaded by politicians), or any other raw materials, or to import any articles that could interfere with the monopoly of *British* manufactures—were exempted from the operations of the act. That shews that gambling was not the only thing to be guarded against. If a policy contain words to the same effect as those enumerated in the act, the case is within it, although it may be manifest that it is not a gaming insurance. The temptation to fraudulent insurances is very great. The object to be attained by them is often easily accomplished; and the consequences to that most valuable class of men, under-writers, and to seamen, whose lives are often put in hazard, owing to such insurances, are dreadful. The case of The *King* v. *Codlin*, *Easterby* and *M'Farlane* (*a*), in which I was counsel for two of the prisoners, and others that have been brought before Courts of justice, prove that such frauds are committed. We cannot too strongly enforce all the provisions of this statute. If we hold, that policies not containing the words recited in the statute, and which are not gaming policies, are valid, we shall render inopera-

(*a*) East's P. C. Addenda xxvii; by Curwood, 346; 2 Russell on S. C. 1 Hawkins's P. C., 8 Ed. Crimes, 1738.

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tive its provisions against fraudulent insurances, and such as encourage clandestine trade. The act does not say, that policies containing certain specified words shall be void, but that "no assurances shall be made, *interest or no interest*, or *without further proof of interest than the policy*." The meaning of this clause is, that no insurance shall be effected by a policy so worded as to entitle the assured to recover, against the under-writers, a certain stipulated sum of money, whether he had any interest in the ship or cargo, or not; or to bind the under-writer not to require any more proof of the assured's interest, than the admission of such interest on the policy. Whatever words may be used, if that be the effect of the policy, no action can be maintained on it. This is the only construction that can restrain the practices intended by the act to be prevented; and which is according to the import of the words used by the Legislature. It was thought, at one time, that all valued policies were within the act; and, when one considers that frauds by the loss of ships may be accomplished by means of policies in which a higher value is put upon articles insured than they are worth, there was reason for thinking so. But the case of *Lewis* v. *Rucker* (*a*) has determined, that policies *only covering the prime cost of the goods, are valid*. In the case of *Grant* v. *Parkinson*, the policy declared, "that, in case of loss, the profits should be valued at 1000*l*., without any other voucher than the policy." Lord *Mansfield*, at first, thought that the policy was void. On further consideration, his Lordship said, "it is incumbent on the plaintiff to prove *some interest*. The meaning of the policy is, not to evade the act of Parliament, but to avoid the difficulty of going into an exact account of the *quantum*. I cannot distinguish it from a valued policy." If a policy, however, dispense altogether with proof of interest, it is within the act, and

(*a*) 2 Burr. 1167; *S. C.* Park on Insurance, 6 Ed. 353.

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void. If the plaintiff must prove his interest, and the policy only save him the trouble of shewing its value, it is a valued policy, and good. Let us try the validity of the policy on which this action is brought, by this test. The words of the policy are, " the goods and merchandizes for so much as concern the assured and assurers, are, and shall be, valued at *five tierces coffee*, valued at *27l. per tierce*, say 135*l*. *This policy to be deemed sufficient proof of interest.*" That is a full admission of all that the assured would be required to prove, as well with respect to his having goods on board, as to the value of those goods. The words " shall be valued at *five tierces coffee*," admit that five tierces of coffee, belonging to the plaintiffs, were on board. That would dispense with the necessity of proving that any coffee belonging to the plaintiffs was on board. The words " this policy to be deemed *sufficient proof of interest*," are of precisely the same import as the words, " *without further proof of interest* than the policy." As, therefore, no inquiry was to be made whether the assured had any property in the ship, or not, it is, in effect, an insurance *interest or no interest*. We are of opinion that the judgment must be arrested.

Rule absolute.

WADSWORTH *v.* GIBSON.

Thursday, April 29th.

Bail in error required by the stat. 6 *Geo.* 4, c. 96, s. 1, (which was passed to prevent frivolous writs of error), cannot be dispensed with, although there be error in form on the face of the record.

MR. Serjeant *E. Lawes* applied for a rule *nisi*, to dispense with bail being put in upon the writ of error allowed and served in this cause, on an affidavit, which stated, that a writ of *capias ad respondendum* was sued out of this Court, into the county palatine of *Lancaster*, to which the defendant appeared; that the plaintiff declared in a plea of trespass on the case, laying the venue in *Lancashire;* to which the defendant did not plead, but allowed judgment to go by default; that a writ of inquiry was executed in the county palatine of *Lancaster*, and final

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judgment was signed on the 28th instant; that a writ of error had issued, which had been duly allowed and served; and that such writ was not for delay; but that it was the intention of the defendant to assign for error, the want of an original writ; which is good and substantial error. The learned Serjeant submitted, that, although the statute 6 *Geo.* 4, c. 96, s. 1 enacted, that, in all judgments thereafter to be given in personal actions, execution should not be stayed or delayed by writ of error, without the order of the Court, unless a recognizance, with condition, according to the stat. 3 *Jac.* 1, was first acknowledged in the same Court; yet that the statute 6 *Geo.* 4, was passed to prevent *frivolous* writs of error only; whilst here there was manifest error on the record, as an original writ cannot be issued into a county palatine.

But the Court held, that the defendant was, at all events, bound to put in bail; and that, as the error assigned was a mere formal objection, he was not entitled to any indulgence.

The learned Serjeant, therefore, took nothing by his motion.

Thursday, April 29th.

DAVIES and Another, Assignees of How, a Bankrupt, *v.* WILKINSON.

Where a party has a right to sue on a policy in *his own name*, and has also *a lien* on the goods insured thereby, he may set off the amount of a loss incurred before the arrival of the goods, in an action for premiums, brought by the assignees of the underwriter who subscribed the policy, and who became bankrupt since the loss. Therefore, an insurance broker, having been sued by assignees of a bankrupt, for premiums received by him on policies subscribed by the bankrupt:—*Held*, that the defendant might set off a loss on goods in one of those policies effected in his own name by the order of his principals, although the goods belonged to the principals, the broker having a lien on them.

THIS was an action of *assumpsit*, brought by the plaintiffs, to recover the sum of 177*l.* 6*s.* 1*d.*, the balance of premiums of insurance alleged to be due from the defendant to the bankrupt's estate. The *first* count of the declaration stated, that the defendant was indebted to *How*,

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before his bankruptcy, in the sum of 500*l.*, for certain premiums of insurance before then due and payable from the defendant to the bankrupt, in respect of the latter having under-written and subscribed divers policies of insurance for the defendant, for and on account of the defendant and divers other persons, for the insurance of divers large sums, upon divers ships and vessels, and upon divers goods and merchandizes, and the freights of and to be earned by the said ships, on divers voyages, by the bankrupt, before his bankruptcy, insured for the defendant, and at his request. The *second* count was on a *quantum meruit;* to which were added the common money counts, in all of which the defendant was stated to have been indebted to the bankrupt before his bankruptcy. The defendant pleaded the general issue.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after the last *Trinity* Term, it was admitted, by the respective attornies for the parties, that the defendant was indebted to the bankrupt's estate for premiums, in the sum of 177*l.* 6*s.* 1*d.*; that the bankrupt subscribed a policy on goods by the ship *Nestor*, from *London* to *New York*, effected by and *in the name of* the defendant, for 200*l.*, on which a loss had occurred, amounting, on the bankrupt's subscription, to 181*l.* 10*s.* 8*d.*, and that the goods insured by the policy were not the goods of the defendant. It further appeared, that the defendant effected the policy on the goods by the *Nestor*, by the order of *Thompson & Co.* of *Leeds*, to whom they belonged; and that, at the time of effecting the insurance, they were indebted to the defendant in 1000*l.*; and that such sum still remained due. For the plaintiffs, it was insisted, that the defendant could not claim a right to set off the loss on the policy by the *Nestor*, against the debt due from him to the bankrupt for premiums; as he effected such policy as the agent only for Messrs. *Thompson & Co.*, the owners of the goods. The defendant, on the other hand, claimed

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such right, on the grounds, that the policy was effected *in his own name*, and that there was a mutual credit subsisting between him and the bankrupt, before and at the time of the bankruptcy. A verdict was taken for the plaintiffs for the amount of the premiums sought to be recovered, leave being reserved to the defendant to move to set it aside, in case the Court should be of opinion that the defendant was, under the circumstances, entitled to set off the loss by the ship *Nestor*.

Mr. Serjeant *Wilde*, in the last *Michaelmas* Term, accordingly obtained a rule *nisi*, and submitted, that, as the policy on the goods by the *Nestor* was effected by the defendant *in his own name*, he might have sued the bankrupt in respect of the loss; and that, as the bankrupt gave the defendant credit for the premiums, the latter was entitled to set off the amount of the loss he might have recovered against the bankrupt on the *Nestor's* policy, he having a lien on the goods insured thereby, to the amount of the sum due to him from Messrs. *Thompson & Co.*, his principals. The learned Serjeant referred to the cases of *Grove* v. *Dubois* (*a*), *Cumming* v. *Forester* (*b*), *Bize* v. *Dickason* (*c*), *Koster* v. *Eason* (*d*), *Parker* v. *Beasley* (*e*), *Goldschmidt* v. *Lyon* (*f*), *Minett* v. *Forrester* (*g*), *Shee* v. *Clarkson* (*h*), and *Parker* v. *Smith* (*i*), as bearing on the point in question.

Mr. Serjeant *Taddy*, and Mr. Serjeant *E. Lawes*, now shewed cause. Although the defendant effected the policy on the *Nestor* in his own name, yet he was *not interest-*

(*a*) 1 Term Rep. 112.
(*b*) 1 Mau. & Selw. 494.
(*c*) 1 Term Rep. 285.
(*d*) 2 Mau. & Selw. 112.
(*e*) Ibid. 423.
(*f*) 4 Taunt. 534.
(*g*) Ibid. 541, n.
(*h*) 12 East, 507.
(*i*) 16 East, 382.

ed in the goods which were the subject-matter of the insurance, and the loss of which is now attempted to be set off: and though Messrs. *Thompson & Co.*, his principals, were indebted to him at the time of effecting the insurance, in a sum exceeding the value of the goods, yet it did not appear that he had made any advances on account of those specific goods. In *Koster* v. *Eason*, where the defendants, insurance brokers, effected several policies in the name and on account of their own firm, it was held, in an action brought against them for premiums by the assignees of one of the under-writers upon those policies, who had become bankrupt, that the defendant might set off losses and returns due on all such policies; but there the Court proceeded on a very narrow ground; for the defendants had effected policies, some in the name and on account of their own firm; others in their own names, but on account of their principals; and others in the names and on account of principals for whom they acted under a *del credere* commission without the knowledge of the under-writers: and it was decided that they could not set off losses due on such policies as were effected in the names of their principals. But it is immaterial whether the name of a broker be inserted in a policy or not, as it is generally effected for all persons who may appear to be interested; and here the defendant acted as the agent or broker for *Thompson & Co.*, who were alone interested in the goods on which the policy was effected; and although it may be said that he might have brought an action on it in his own name, according to the principle laid down in *Koster* v. *Eason*; yet there, the brokers acted under a *del credere* commission, which put them in the situation of principals. In *Parker* v. *Beasley* (which goes much further than any other decision), where brokers effected policies on goods on account of their principals, but in their own names, and accepted bills drawn on them

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on account of the goods, which were consigned to them, and lost before arrival—it was held that they might set off such losses in an action brought by the assignees of the under-writer (since a bankrupt) for premiums, although they had not any commission *del credere*, and the losses were not adjusted; yet there the defendants had actually accepted bills against the goods insured, which gave them *a lien* on the policies. And Mr. Justice *Le Blanc* there said (*a*): "The case of *Koster* v. *Eason* established this, that where the broker himself is a party to the contract, so as to enable him to maintain an action in his own name, if he has acquired an interest by a *del credere* commission, he is entitled to a set off. It is the same thing if he acquire an interest by advancing on the credit of the consignment." Here, however, the defendant had no interest in the goods insured, nor had he advanced any money on them, and his merely having a right of lien as against his principals cannot entitle him to set off the loss in question as against the under-writer, and there is a manifest distinction between a general and a particular lien. In *Minett* v. *Forrester* (*b*), it was held that an insurance broker, who was indebted to the estate of a bankrupt under-writer, for premiums, could not, without a *special authority*, set off against that debt sums due from the under-writer for returns of premiums, whether the returns became due before or after the bankruptcy. So, in *Goldschmidt* v. *Lyon* (*c*), a broker, who was indebted to the assignees of a bankrupt, for premiums due to them upon policies subscribed by the bankrupt before his bankruptcy, was held not to be entitled to set off returns of premiums due upon the arrival of ships which arrived since the bankruptcy. The case of *Minett* v. *Forrester* therefore goes the full length of this, and must govern it.

(*a*) 2 Mau. & Selw. 427. (*b*) 4 Taunt. 541, n. (*c*) Id. 534.

Mr. Serjeant *Wilde*, in support of his rule, was stopped by the Court.

Lord Chief Justice BEST.—I think this case falls within the principle laid down by the Court of *King's Bench* in *Parker* v. *Beasley*. What are the facts? The bankrupt, *How*, subscribed a policy on goods by the *Nestor*, which policy was effected in the name of the defendant, and on which a loss has occurred, amounting to 181*l*. The defendant was indebted to the bankrupt's estate, for premiums, in 177*l*.; and he claimed to set off the amount of the loss against the debt due from him to the bankrupts for premiums. Although the policy on the *Nestor*, subscribed by the bankrupt, was made in the name of the defendant, yet the goods insured did not belong to him, but to Messrs. *Thompson & Co.*, who ordered the insurance to be effected; and it has been contended for the plaintiffs, that the defendant cannot set off the amount of such loss, because he was not interested in the goods. But it is most material to consider that he might have brought an action against the bankrupt on the policy, as he had a lien on the goods insured, although they were not his; as he acted as the broker for *Thompson & Co.*, who were indebted to him for premiums at the time the insurance was effected, in the sum of 1000*l*., which still remained due, and which is far beyond the amount of the loss, or even the value of the goods insured. The defendant then having such lien on the policy, for premiums owing to him by his principals, he had clearly a right to sue the bankrupt on the policy. Although the case of *Parker* v. *Beasley* is not exactly in terms with the present, yet we may extract principles from it by which this must be governed. There was no *del credere* commission in that case; and although the brokers had accepted bills drawn on them by their principals on account of the goods, yet the ground on which the Court decided was, that the

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brokers' *names being on the policies*, they had a right to maintain an action against the under-writers in their own name; and that where a party has a right to sue on the policy, and has also a lien on the goods insured, he may set off the sums to be received from a loss incurred before the arrival of the goods, in an action for premiums brought by the assignees of the under-writer, who had become bankrupt since the loss. Here, there can be no doubt but that the defendant had acquired an interest, as he had a lien on the goods which were the subject-matter of the policy subscribed by the bankrupt, and had, consequently, a right to sue him on that instrument. The defendant, therefore, stands in the same situation as did the brokers in *Parker* v. *Beasley*. But, independently of that case, or the case of *Koster* v. *Eason*, it seems to me that the doctrine of mutual credit between the bankrupt and the defendant is more applicable in favour of the latter than a mere right of set off (*a*). It is clear that the bankrupt gave the defendant credit for the premiums; and it is equally so that the latter gave credit to the bankrupt, and might, by virtue of his lien, maintain an action on the *Nestor's* policy, in his own name, and for his own benefit. He had a legal right to recover, and an equitable right to retain; and, although it may be said that *Thompson & Co.* might claim to recover on the policy, the goods insured being their property, yet they could not do so, without first discharging the debt due from them to the defendant. Lord *Mansfield* has said, that the law of set off is founded on an equitable doctrine: and the Courts have uniformly endeavoured to extend it. The case of *Minett* v. *Forrester* differs from the present in all its circumstances; but it is sufficient to advert to one only, *viz.* that it does not appear that the policy was effected in the name of the party who claimed the right of set off. Relying, however, on the decision of the Court in *Parker*

(*a*) See the statute 5 *Geo.* 2, c. 30, s. 28.

v. *Beasley*, and the right of the present defendant to sue on the policy, it having been effected in his own name as well as on the equitable rights of the parties, I am clearly of opinion that the defendant is entitled to the set off he claims, in respect of the loss in question.

Mr. Justice PARK.—Whether we look at the justice of this particular case, or at the principles on which others have been decided, I am clearly of opinion that this rule must be made absolute. The cases which have been determined on this subject have proceeded by degrees, and those of *Koster* v. *Eason*, and *Parker* v. *Beasley*, appear to me to establish a principle to warrant us in deciding in favour of the defendant's claim. In the former case, the brokers had a *del credere* commission, and the Court held that they were entitled to set off a loss on policies effected in the name of their own firm. I was counsel in the case of *Parker* v. *Beasley*, and took the distinction that the brokers did not act under a *del credere* commission, as in *Koster* v. *Eason*, but without success; for the Court thought the principle the same, whether they acted under such commission or not. So, here, although there was no *del credere* commission, yet the policy under which the goods were insured, was effected in the name of the defendant (the broker), who might have maintained an action against the under-writer (the bankrupt) upon it in his own name. He had a material interest in the policy, having a lien on the goods insured, and the owners of those goods could not have taken them out of his hands without satisfying it; and, although, it has been said, that they might have maintained an action; yet Lord *Ellenborough*, in *Parker* v. *Beasley*, said, with respect to the rights of brokers, as to this point: "The policies being in their own names, and the contract of the under-writer originally with them, they might have brought an action in their own names; and the Court would not have stayed

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the proceedings, unless the principals had indemnified them against the bills, in which case the Court would have suffered the action to go on for their benefit. Although they might not be interested in the goods originally, yet a subsequent interest may accrue by lien;" and his Lordship previously observed: "If the parties had not had a lien, their names would have stood in the policy as mere naked names, not coupled with an interest; but they may have an interest, not only by a *del credere* commission, *but also by a lien.*" That is the principle on which I found my opinion. Mr. Justice *Le Blanc* also said: "The case of *Koster* v. *Eason* established this—that, where the broker himself is a party to the contract, so as to enable him to maintain an action in his own name, if he has acquired an interest by a *del credere* commission, he is entitled to a set off. It is the same thing if he acquires an interest by advancing on the credit of the consignment;" and Mr. Justice *Bayley* added: "There is an express contract between the under-writer and these defendants; for the policies are in their names; and, by suffering their names to be inserted in the policies, the under-writer has agreed that they shall be considered as principals if they have an interest; and they have an interest by making the advances." So, here, the defendant had an interest, he having a lien on the policy for premiums due to him from *Thompson & Co.*; and, therefore, he had a right to sue the bankrupt on the policy.

Mr. Justice BURROUGH and Mr. Justice GASELEE were also of opinion, that this case must be governed by the principle established in *Parker* v. *Beasley*.

Rule absolute.

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LAWRENCE and Another, Assignees of TOLSON, a Bankrupt, *v.* CROWDER and Another, Sheriffs of *London*.

Tuesday, April 29th.

In an action by the assignees of a bankrupt, a clerk of the defendants' attorney delivered a plea of the general issue, at the office of the plaintiffs' attorney, without a notice to dispute the bankruptcy, as required by the statute 6 *Geo.* 4, c. 16, s. 90. On the same day, and before the time for pleading had expired, the clerk called again and took away the plea, saying that there was a mistake in it; and shortly afterwards he delivered another with the notice attached:—*Semble*, that such notice is insufficient.

THIS was an action of *trover*, by the assignees of one *Tolson*, a bankrupt. At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after *Trinity* Term, 1827, it appeared that the defendants' time for pleading expired on the 27th *February*; that, on the 26th, a clerk of the defendants' attorney delivered a plea of the general issue at the office of the plaintiffs' attorney, without a notice attached, as required by the statute 6 *Geo.* 4, c. 16, s. 90 (*a*), of the defendants' intention to dispute the act of bankruptcy by *Tolson*; that, in two or three hours afterwards, the clerk of the defendants' attorney went back to the office of the plaintiffs' attorney, and, saying that there was a mistake in the plea he had delivered, got it back, and shortly afterwards returned with another plea of the general issue, to which the notice was attached; and, that, on the delivery of the second plea, the clerk of the plaintiffs' attorney said "very well;" but the defendants' clerk did not tell him that the notice was added. Under these circumstances, the Lord Chief Justice was of opinion, that the notice was insufficient, as the statute requires it to be given by a defendant *at or before* pleading; and, consequently, that it did not throw on the plaintiffs the *onus*, of proving the several ingredients of *Tolson's* bankruptcy. The Jury accordingly found a verdict for the plaintiffs,

(*a*) By which it is enacted—"That, in any action by or against any assignee, or in any action against any commissioner or person acting under the warrant of the commissioners, for any thing done as such commissioner, or under such warrant, no proof shall be required, at the trial, of the petitioning creditor's debt or debts, or of the trading, or act or acts of bankruptcy, respectively, unless the other party in such action shall, if defendant, *at or before pleading*, and, if plaintiff, *before issue joined*, give notice, in writing, to such assignee, commissioner, or other person, that he intends to dispute some, and which, of such matters."

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his Lordship reserving leave to the defendants to move that it might be set aside, and a nonsuit entered, or a new trial granted, in case the Court should be of opinion that the notice was sufficient.

Mr. Serjeant *Taddy*, in the last *Michaelmas* Term, accordingly obtained a rule *nisi*, against which—

Mr. Serjeant *Wilde* now shewed cause. The defendant's attorney should have applied for leave to withdraw the plea first delivered, and plead *de novo*. In *Willock* v. *Smith* (*a*), a question arose on the statute 49 *Geo.* 3, c. 121, s. 10, which was similar in terms to the 6 *Geo.* 4, c. 16, where the general issue had been pleaded without notice, and a Judge gave the defendant leave to withdraw his plea, and plead it *de novo*, adding the notice required by the act. So, in *Decharme* v. *Lane* (*b*), although the defendant pleaded without giving notice at or before the time of pleading; yet, it was held, that, if he had leave to withdraw his plea and plead *de novo*, a notice given with the second plea was sufficient. In *Gardner* v. *Slack* (*c*), the defendant had leave, under a Judge's order, to withdraw a plea of the general issue pleaded without notice, and to plead it *de novo* with notice. But the case is different, when there is no leave to plead *de novo;* for, in *Poole* v. *Bell* (*d*), where a defendant, in an action by assignees, pleaded the general issue without giving notice of his intention to dispute the act of bankruptcy; but before the time for pleading had expired, delivered another plea of the general issue, with a notice of his intention, such notice was deemed insufficient.

Mr. Serjeant *Taddy*, in support of his rule. In *Poole* v. *Bell*, two pleas of the general issue were delivered, and Lord *Ellenborough* said: "The first plea was good and effectual to all purposes, and the defendants ought to have

(*a*) 2 Camp. 184.
(*b*) Ibid. 325.
(*c*) 6 B. Moore, 489.
(*d*) 1 Stark. N. P. C. 328.

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moved for leave to withdraw it, in order that they might plead *de novo*, and give the proper notice; they would then have been in their entire situation;" and here the clerk to the defendants' attorney requested to have the first plea given back to him, which having been done, he afterwards delivered the second.

By the Court.—The second plea, with the notice affixed, was delivered to the clerk of the plaintiffs' attorney behind the back of his principal, and he was not told that the notice had been added. The bankruptcy was not the main point in issue at the trial. If we allow a new trial, it must be on the terms of the defendants' attorney paying the costs of the last trial, as between attorney and client; and the defence must be confined to the act of bankruptcy; and if the plaintiffs prove it to the satisfaction of the Judge who may try the cause, they must have judgment of the term.

On these terms—

Rule absolute.

Thursday, May 1st.

MACBEATH, a Prisoner, *v.* COOKE and two Others.

A plaintiff being charged in execution, for costs on a verdict obtained by three several defendants, two of them signed a note for his sixpences, and the attorney who conducted the cause signed for the third, who was abroad, but without any authority from him:—Held, that such note was insufficient, as the authority of the attorney determined on final judgment being signed.

THE plaintiff being charged in execution, for costs due to the defendants on a verdict recovered by them, and final judgment entered up thereon, was, in the last Term, brought up to be discharged under the Lords' act, *32 Geo. 2*, c. 28, when, his schedule being imperfect, the Court ordered him to be remanded, and to be brought up within the *first week* of this Term.

Mr. Serjeant *Andrews* now opposed his discharge, on the ground that the *first week* of the Term had elapsed.

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But, the Secondary having stated, that the rule was obtained in due time, and that the prisoner was brought up according to the practice of the Court—

Mr. Serjeant *Andrews* offered a note to allow the prisoner his sixpences, under the 13th section of the statute, by which it is enacted, "that a prisoner shall be discharged by the Court, after being remanded, on his executing an assignment and conveyance of his estate and effects, unless the creditor agree, by writing, signed with his name or mark, (or, if he be out of *England*, under the hand of his attorney), to pay and allow the prisoner, weekly, a sum not exceeding 3*s.* 6*d.* (or if more creditors than one insist on his detention, not exceeding 2*s.* a week each), to be paid on *Monday* in every week, so long as the prisoner shall continue in execution."

But, as it appeared that one of the defendants was residing abroad, and that the note had only been signed by the other two, and by the attorney for the former, who had received no authority to act for him since the judgment was signed, the Court held the note to be insufficient, as it was necessary that all the creditors in the suit should sign it; and said, that the rule applied to this case, although the parties signing were defendants, and that, when final judgment was signed, the authority of the attorney of the absent party was determined.

The prisoner was accordingly—

Discharged (*a*).

(*a*) See *Rex* v. *Wilkinson*, 7 Term Rep. 156; *Meux* v. *Humphry*, 8 Term Rep. 25; *Rex* v. *Davis*, 1 Bos. & Pul. 336.

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BARTRAM *v.* FAREBROTHER and Another, Sheriff of *Middlesex*.

Thursday, May 1st.

A dealer in *London* ordered goods of the plaintiff, a merchant at *Edinburgh*. The goods were shipped, and invoices sent to the vendee, which he received on the 29th *October*. Part of the goods arrived at a wharf in *London*, on the 2d *November*, and the remainder on the 4th: the whole were landed on the 6th. On the 2d, the vendee, being insolvent, told his clerk that he would not receive the goods, and desired him to direct one *V.*, an attorney, to cause them to be stopped for the vendor. The attorney, accordingly, on the 3d *November*, gave notice to the wharfinger not to deliver the goods which had then arrived, and on the 4th, wrote to the vendor to inform him of the stoppage. On the 6th, the vendor's agent returned an answer, requesting the attorney also to stop the goods that arrived on the 4th; which he accordingly did verbally. The agent, on the same day, wrote to the wharfinger, confirming the act of the attorney. On the 7th, the goods were seized by the sheriff, under an execution against the consignee, and afterwards sold:—*Held*, that the vendor was entitled to recover the value of the goods in an action of *trover* against the sheriff; as the contract between the vendor and the vendee was rescinded before the right of the execution creditor had intervened;—that the *transitus* was not at an end on the arrival of the goods at the wharf;—and that the vendor's adoption of the act of the attorney for the vendor, before the seizure under the execution, amounted to an assent to the repudiation of the contract.

THIS was an action of trover, to recover the value of thirty-eight hogsheads of ale, belonging to the plaintiff, which had been seized and sold by the defendants, as sheriff of *Middlesex*, under an execution at the suit of one *Adam Park*.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after the last *Trinity* Term, it appeared, that one *Mungo Park*, a *Scotch* ale merchant in *London*, had ordered the ale in question of the plaintiff, a brewer at *Edinburgh*, the invoices of which arrived in *London*, and came to the hands of *Park* on the 29th *October*, 1826; that twenty-five hogsheads of the ale arrived at the *Leith* and *Berwick* Wharf, on the 2d *November* following, and thirteen other hogsheads on the 4th, the whole being landed on the wharf on the 6th; that, on the arrival of the twenty-five hogsheads, on the 2d *November*, *Park*, being insolvent, told his clerk that he should not take the ale, and directed him to go to one *Vincent*, an attorney, and desire him to do what was necessary to stop it; that *Vincent*, in pursuance of such order, on the following day, *viz.* the 3d *November*, served a notice on the wharfinger not to deliver the twenty-five hogsheads, and on the 4th, the day the thirteen hogsheads arrived, wrote to the plaintiff at *Edinburgh*, informing him of the stoppage. On the 6th, the plaintiff's agent returned an answer, requesting *Vincent* to take the necessary steps to prevent the thirteen hogsheads being delivered to *Park*; and he also

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wrote to the wharfinger confirming what had been done as to the twenty-five hogsheads by *Vincent*, who, on the same day, went to the wharf and verbally extended the stoppage to the thirteen hogsheads, and all other consignments from the plaintiff to *Park;* but the plaintiff's letter was not received in *London* until the 9th. On the 7th, the defendants, as sheriff, seized the ales, under an execution against *Mungo Park*, the consignee, at the suit of *Adam Park*, his uncle; and, on the 11th, one *Stewart*, another agent of the plaintiff, demanded the whole of the ale, when the wharfinger referred him to the defendants, to whom a notice was given not to sell, but on the 13th they removed the ale from the wharf, and, on the 24th, sold it by public auction under the execution. For the defendants, it was objected, that the plaintiff was not entitled to recover, on two grounds—*First*, that the *transitus* was at an end before any act was done on his behalf to stop the ale; and *secondly*, that the act of *Vincent* did not avail, as he was not authorized by the plaintiff, the consignor, to stop the ale on its arrival, but only acted as the agent or attorney of *Park*, the consignee. A verdict was taken for the plaintiff, leave being reserved to the defendants to move to set it aside and enter a nonsuit, in case the Court should be of opinion that the objections taken at the trial were well founded.

Mr. Serjeant *Wilde*, in the last *Michaelmas* Term, accordingly obtained a rule *nisi*, and submitted, that the defendants were, at all events, entitled to the amount of the proceeds of the twenty-five hogsheads of ale which arrived on the 2d *November*, *Vincent* then having no authority from the plaintiff to stop them.

Mr. Serjeant *Cross* now shewed cause. *First*, the contract between the plaintiff and *Mungo Park*, to whom the ale was consigned, was rescinded by the latter's refusing to take the *first* twenty-five hogsheads, on the day they

arrived at the wharf. *Secondly*, supposing the contract to be still existing, the transit was ended by the stoppage, before the defendants seized under the execution. And *lastly*, although *Vincent* might not, in the first instance, have been authorized, as the agent of the plaintiff, to stop the ale; yet his act was afterwards adopted and ratified by the plaintiff.—The contract between the plaintiff, the consignor, and *Park*, the consignee, was rescinded on the 2d *November*, the latter having on that day refused to receive the ale, and having ordered his clerk to take every necessary means to stop it, and to prevent its being delivered to him, as he was then in insolvent circumstances; and he never afterwards attempted to claim any part of the ale. The case of *Salte* v. *Field* (*a*) is far stronger than the present. There, it was held, that, if the vendor of goods accept an offer previously made by the purchaser to return them, the contract is thereby rescinded, and the property revested from the time of the offer, so as to avoid an attachment laid in the interim by the creditors of the purchaser, although the vendee *had actually accepted* the goods. So, in *Atkin* v. *Barwick* (*b*), it was determined, that, if goods are consigned upon credit, and the consignee, before he has committed an act of bankruptcy, suspecting his insolvency, refuse to accept the goods, and the consignor consent to receive them back, the goods will not pass by the assignment.

The learned Serjeant was proceeding with his argument, when the Court called on—

Mr. Serjeant *Wilde* to support his rule. The authority of *Atkin* v. *Barwick* cannot be supported. It has frequently been impugned: *first*, by Lord *Kenyon*, in *Neate* v. *Ball* (*c*), where he said, that he never heard it quoted without some comment upon the law of it. And

(*a*) 5 Term Rep. 211. (*b*) 1 Str. 165. (*c*) 2 East, 124.

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in *Richardson* v. *Goss*, Mr. Justice *Chambre* said (*a*), that, "if a case precisely similar to *Atkin* v. *Barwick* were now to arise, it would not receive the same decision." Here, however, there is no ground to say that there has been a repudiation of the contract by *Park*, the consignee. The notice by *Vincent* to the wharfinger amounted only to an order to stop the ale; and he was not the agent or attorney for the plaintiff, the consignor, but acted for the consignee alone. If the contract had been rescinded, there would be no doubt but a mere order to stop goods *in transitu* only confers a right of lien on the party in whose custody they are; and such an order can only be valid when given by a consignor, or by an agent duly authorized by him. Besides, the transit was completely at an end. Neither *Park* nor *Vincent* intimated any intention that the contract should be rescinded; and, if the order to stop the ale had been afterward revoked by *Park*, the plaintiff would have been bound to complete his contract. It is necessary to look at the situation of the vendor and vendee, on the 7th *November*, when the defendants seized the ale under the execution. If *Park*, the vendee, had remained silent from the time of its arrival, and the price had fallen in the market, the plaintiff would, nevertheless, have been entitled to recover its amount, according to the invoice price. It must be admitted, that, if the plaintiff himself had gone to the wharf, he might have rescinded the contract; but a mere order to stop goods, by an unauthorized agent of the vendor, cannot amount to a repudiation of a contract, or have the effect of rescinding the sale of such goods: nor will a subsequent adoption or ratification of such order by the seller operate so as to annul or cancel the contract. At all events, *Vincent* had no authority to stop the goods, so as to affect the rights of third persons; nor can a stranger to a consignor order a wharfinger to stop goods in his hands, or to abstain from delivering them to the

(*a*) 3 Bos. & Pul. 127.

consignee, without the previous authority of such consignor. In *Salte* v. *Field* there never was a subsisting contract. There, goods were sold, and delivered to the clerk of the vendee, and, whilst they were in the packer's hands, the clerk received a letter from his principal in *America*, saying that he was ruined; and adding, that, if he, the clerk, had purchased any goods for his account, he was to let the vendors have them back. The repudiation by the buyer, therefore, was made before there was any contract or sale capable of adoption by the vendor. But in *Smith* v. *Field* (*a*), where a vendee wished to return goods to a vendor, and the latter sued out an attachment to attach the goods in the hands of a packer, as the property of the vendee; that was considered to be an election by the vendor not to rescind the contract; and, the vendee having afterwards become bankrupt, it was held that the vendor could not recover the goods from the packer, in trover. The rule, that a trader, on becoming insolvent, may rescind a contract in favour of a particular creditor, is limited to cases where the contract is not complete. Therefore, in *Barnes* v. *Freeland* (*b*), where a vendor sold and delivered goods to a vendee, and received in payment a bill of exchange at nine months' date; but before the bill became due, and four months after the sale of the goods, the vendee informed the vendor that he must stop payment, and offered to restore the goods to him, and the vendor received them back—it was held that the vendee could not rescind the contract, or return the goods to the vendor, as it would be giving the latter a preference to his other creditors. And Lord *Kenyon* there observed (*c*): "It is said, however, that the vendor may, in all cases, rescind his contract, with the consent of the vendee, at any time before the bankruptcy of the latter: but, if that were so, all the creditors of a bankrupt whose goods remained in his hands in specie, might, when they found

(*a*) 5 Term Rep. 402. (*b*) 6 Term Rep. 80. (*c*) Id. 85.

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that he was in insolvent circumstances, go to the bankrupt's property and bring away what each had contributed to the fund, leaving nothing to satisfy the rest of the creditors." Here, there was not only an admitted contract between the vendor and purchaser; but, on the order for the ale being sent by *Park*, it was forwarded on his account. He received the invoices accordingly, and the ale remained at the wharf for him, and on his account alone, until the wharfinger received *Vincent's* order. There was no adoption, by the plaintiff, of the act of *Vincent*, until the rights of third persons had intervened; the letter of the plaintiff's agent not having arrived when the ale was seized under the execution. The case of *Neate* v. *Ball* (*a*) is an authority in favour of the defendants. There, the course of dealing between the vendor and vendee was, that sometimes wool was sent by the vendor with, and sometimes without, a specific order; but the vendee had always the option of returning the goods if he had no call for them. The vendor sold, by order, thirteen bags of wool to the vendee, who received the invoice in *January*, and on the 14th *February* the bags were sent. The vendee was not at home when they arrived, and they were deposited in his warehouse. On his return home, on the same day, he gave directions that the bags should not be opened; but he gave the invoice to his foreman, with orders to weigh off and examine the wool therewith; and they were deposited with other goods of the vendee. The vendee became embarrassed, and on the 4th and 5th *March* returned the wools to the vendor, declaring his situation, and hoping that the latter would have no objection to take them back, and requesting a line of approbation thereof. The vendor received the letter, and gave his consent to the return of the wools. The vendee committed an act of bankruptcy on the same day, and before the letter was sent by the vendor:—it was held, that the vendee, by keeping possession of the goods

(*a*) 2 East, 117.

so long, lost his option, which ought to have been exercised on the receipt of them; and that, being in a state of insolvency, he could not exercise the power of restoring the goods to the vendor, though it was done without any fraudulent concert with him; and the assignees of the vendee were declared to be entitled to the wools. Here, however, there was no option by the vendee, to warrant the return of the ale, nor did the vendor consent to receive it back until five days after its arrival. As, therefore, there was no evidence to shew that *Vincent* was authorized, as the agent of the plaintiff, to stop the ale, at the time he sent the order to the wharfinger, and as *Park*, the consignee, had done nothing to rescind his contract, the defendants were entitled to sell under the execution. *Park* should have acted openly, and declared his insolvency to the wharfinger, and not have directed his attorney to stop the ale; and, as the plaintiff's claim was adverse to the rights of third parties, the wharfinger would have been guilty of a conversion if he had acted on the unauthorized order of *Vincent*, whose act must be considered as nugatory and unavailing.

Lord Chief Justice BEST.—This is an action against the defendants, Sheriff of *Middlesex*, for taking in execution certain goods as the property of one *Mungo Park*, at the suit of his uncle, *Adam Park*. No act of bankruptcy having been committed, the policy of the laws relating to bankrupts does not apply. The question then is—when can an execution creditor seize goods which are the property of his debtor by purchase? It is when the contract between the vendor and purchaser is complete. If it be not complete, but is merely suspended, the property in the goods does not vest in the purchaser, so as to entitle the execution creditor to take them. But I am of opinion that, under the circumstances of this case, and the facts as proved at the trial, the contract between the plaintiff and *Park*, as to the ale in question, was completely rescinded and

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put an end to. The ale was sold by the plaintiff, the consignor, in *Scotland;* and the invoices were received by the consignee, on the 29th *October*, 1826. On the 2d *November* following, the consignee declared to his clerk, that he was insolvent, and that he would have nothing to do with the ale. That was clearly a repudiation of the contract on his part; and although he adopted a bungling course, by directing his clerk to desire *Vincent* to stop the goods, and thereby making *Vincent* the agent for the plaintiff; yet it is evident that *Park's* intention was, to get rid of the contract altogether. If, however, this had not been acceded to by the vendor, it would not have sufficed. But, on the 3d *November*, *Vincent* sent a letter to the wharfinger, giving him notice not to deliver the ale; and on the 6th, the day before it was seized under the execution, the agent of the vendor wrote to *Vincent*, adopting his act, and also to the wharfinger, confirming *Vincent's* previous order. The plaintiff, therefore, could not afterwards have sued *Park* for the amount of the ale. Both parties had agreed to suspend the contract before the rights of a third party had intervened. But it has been said, that, if the vendee had revoked the order to stop the ale, the vendor might have been compelled to complete the contract. It is, however, unnecessary to consider that point, as he did not do so; and when the seller consented to the proposal made by the buyer, to stop the ales, it had the effect of suspending or putting an end to the contract altogether. This question, therefore, may be decided without any difficulty, and without reference to any authority; for, until the rights of third parties have actually intervened, the original contracting parties may, at any time, put an end to their contract; and here the rights of the execution creditor had not intervened until the agreement to rescind the contract had been executed. This case, therefore, may be decided on principles of law, honesty, and reason; but the question seems to me to be put at rest by the case of *Atkin* v. *Barwick*, which appears to be far stronger than the present; and although I

am not prepared to adopt all the reasoning of Lord Chief Justice *Pratt;* yet I think that I should have decided as the Court there did, although not for the same reasons. There, a bankruptcy had intervened, and the assent was subsequent to the act of bankruptcy; but, since the time of that decision, a new distinction has arisen respecting a preference given to one creditor over the rest, in contemplation of bankruptcy. It might, perhaps, have been as well if that doctrine had never been introduced into *Westminster Hall.* Lord *Mansfield* observed, in *Harman* v. *Fisher* (*a*), with respect to the case of *Atkin* v. *Barwick,* "that the judgment seemed to be right, but the reasons wrong." But the case was confirmed in *Salte* v. *Field,* where the property of goods, bought by an agent for the vendee, and delivered by him to the vendee's packer, in whose hands they were attached by the vendee's creditors, was held to revest in the vendor, so as to avoid the attachment, by the vendee's having countermanded the purchase, by letter to his agent, dated *before* such delivery, though not received till *afterwards;* the vendor assenting to take back the goods. It has been said, however, that there was no subsisting contract in that case; but that is not the principle on which Lord *Kenyon* decided; for, said his Lordship (*b*): "It was in the power of the buyer and seller to put an end to the contract, as if it had never existed; and it is stated, that the proposition made by the purchaser to rescind the contract, was acceded to by the sellers. I cannot distinguish this case from that of *Atkin* v. *Barwick,* on principle; for, in that case there had been a delivery of the goods by the seller, with the concurrence of all the parties interested; but the agreement of the parties to rescind that contract put an end to the sale, as if it had never taken place. So, in this case, it was competent to the principal to disavow the contract made by his agent, if the vendors chose to accede to it: the proposition made by the pur-

(*a*) Cowp. 125. (*b*) 5 Term Rep. 214.

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chaser, and which was dictated by common honesty, might have been refused by the vendors, if they had chosen; but they agreed to it; and, by the mutual agreement of both, the contract of sale was *rescinded*." The doctrine laid down in *Salte* v. *Field*, was afterwards confirmed in *Smith* v. *Field*. In the latter case, however, the vendee had become a bankrupt after he wished to return the goods to the vendor; and the interest of his creditors had intervened: and Lord *Kenyon* said (*a*): "In the former case of *Salte* v. *Field*, the Court went as far as they could to assist the seller; but there, both buyer and seller agreed to rescind the contract *before* the bankruptcy. That case, therefore, as well as that of *Atkin* v. *Barwick*, proceeded on the ground of a *renunciation* of the contract by all the parties concerned." His Lordship appears to have proceeded on the principle, that, in both these cases, the contract had been rescinded or renounced; and Mr. Justice *Ashhurst*, Mr. Justice *Buller*, and Mr. Justice *Grose*, confirmed the decision in *Salte* v. *Field*, and distinguished it from *Smith* v. *Field*, as, in the latter case, the vendors refused to renounce or rescind the contract. The subsequent case of *Barnes* v. *Freeland* does not shake or impugn the previous authorities. Lord *Kenyon* there observed (*b*), "It is said that the vendor may, in all cases, rescind his contract, with the consent of the vendee, at any time before the bankruptcy of the latter; but, if that were so, all the creditors of a bankrupt, whose goods remained in his hands in specie, might, when they found that he was in insolvent circumstances, go to the bankrupt's property, and bring away what each had contributed to the fund, leaving nothing to satisfy the rest of the creditors. The goods here were originally sold and delivered to the vendee, and they were locked up in his warehouse: therefore, there was a complete transfer of the property from the defendant to the bankrupt at the time; and the question is, whether, when the latter became insolvent, he could re-

(*a*) 5 Term Rep. 404. (*b*) 6 Term Rep. 85.

deliver it back to the defendant in specie. I cannot, on principle, distinguish the present case from that of *Harman* v. *Fisher;* for this bankrupt knew his insolvent situation at the time when he wished to deliver back the goods in question to the defendant, as well as *Fordyce* did in that case; there, *Fordyce,* finding that he was insolvent, was anxious to repay to the defendant some bills which the latter had lent him; and though those bills were as easily distinguishable from the rest of his effects, as the iron in question was from the rest of this bankrupt's property, the Court there held, that it could not be done, because it would prejudice the other creditors of the bankrupt. Three cases, however, have been cited, and pressed upon us, as deciding the present; but I think they are to be distinguished from this. In *Atkin* v. *Barwick,* the vendees finding that their affairs were in a declining condition, before the goods arrived at their house in *Cornwall,* refused to accept the goods, and thereby refused to become parties to the contract of sale; and, though, when the goods did arrive by the waggon, the vendees could not turn them loose in the street, yet they did what was tantamont to rejecting them; they sent them to a friend of the consignors, for their use. In *Salte* v. *Field,* consider who was the party to the contract; not the clerk of the vendee who lived in *London,* but *Dewhurst* who was residing in *New York;* and he, knowing his insolvent situation, sent orders, a month before the transaction in dispute took place, to his clerk here, not to purchase any more goods for him. The clerk, immediately on the receipt of this order, applied to the vendors to take the goods back again, who agreed to rescind the contract." His Lordship, therefore, confirmed the doctrine laid down in the former cases, drawing a distinction between *Atkin* v. *Barwick,* and *Salte* v. *Field,* and comparing the case of *Barnes* v. *Freeland* to that of *Harman* v. *Fisher,* where the acts were done in contemplation of an act of bankruptcy, and to give a preference to creditors. Here, however, no bankruptcy had in-

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tervened, and, therefore, that principle does not apply. But it has been said, that, in this case, the ale was delivered; and that the transit was completely at an end before the contract between the vendor and purchaser was attempted to be rescinded, or the order to stop them given. But that was not so. Goods in the hands of a carrier or wharfinger cannot be said to have reached their final destination, unless the wharfinger be the actual agent of the consignee. Here, however, it is not necessary to decide whether the goods were properly stopped or not. Neither the case of *Barnes* v. *Freeland*, nor indeed either of the previous authorities to which we have been referred, turned on that point. It is enough for us to say, that the goods were not in the hands of the vendee when the contract was agreed to be suspended by the vendor; neither were they stopped to defraud a general body of creditors, or for the purpose of a fraudulent preference. I am, therefore, of opinion, that this rule must be discharged.

Mr. Justice PARK.—I fully agree with all that has fallen from my Lord Chief Justice. Independently of any authority, the reason and justice of the case are clearly with the plaintiffs. But the principle established by the cases to which we have been referred, appears to me to be the true one; and one that has been adopted by the Courts in favour of *bonâ fide* contracts, when rights of creditors or third persons do not intervene, and when there is no intention to give a fraudulent preference. With respect to the case of *Atkin* v. *Barwick*, it has never been wholly objected to as an authority; but it differs from the present, as here there has been no bankruptcy; and, although I do not altogether agree with the reasoning of Lord Chief Justice *Pratt*, yet, as was said by Lord *Mansfield* in *Harman* v. *Fisher*, "the judgment seemed to be right, but the reasons wrong." Then came the case of *Salte* v. *Field*, which was decided in 1793, and which I attempted to distinguish from *Atkin* v. *Barwick*, but did not succeed;

and all the Judges, in *Salte* v. *Field*, considered that the contract had been entered into, but that it had been put an end to or rescinded, by the assent of the parties; and Mr. Justice *Buller* said: "The principle on which the case of *Atkin* v. *Barwick* was decided, governs this. The point there contended for, was, that there was no consent by the sellers to *rescind* the contract; but, here an express consent by them is stated." In *Smith* v. *Field*, the Court recognised the authority of *Salte* v. *Field*, but distinguished the two cases, as in the latter the vendors declined to rescind or renounce the contract, and, as Lord *Kenyon* observed, the interests of other persons, *viz.* the bankrupt's creditors, had intervened. In *Barnes* v. *Freeland*, the previous decisions were fully considered, and *Atkin* v. *Barwick*, and *Salte* v. *Field*, were not objected to, but were distinguished from *Barnes* v. *Freeland*, where Lord *Kenyon* said: "In this case, the goods were delivered to and accepted by the vendee, and the property remained in him until he became insolvent:" and Mr. Justice *Ashhurst* added: "The contract was complete, and could not be rescinded by any subsequent act of the parties, so as to affect the interests of third persons." Here, however, there was no delivery to the vendee, and the only rights to be affected were those of *Adam Park*, the uncle.

Mr. Justice BURROUGH.—When the facts of this case are considered, the point appears to be quite clear, and we have no need of authority. The only question is, whether the delivery of the ale to the vendee was complete before it was stopped, or whether the contract was afterwards rescinded by the consent of the vendor and vendee. In either case the plaintiff would be entitled to recover.

Mr. Justice GASELEE concurring—

Rule discharged.

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Friday, May 2nd.

KNIGHT and FYSON, Gents., *v.* LEGH, Esq., M. P.

THIS was an action of trover, brought by the plaintiffs against the defendant, to recover damages for the conversion of a bill of exchange by the defendant to his own use. At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after *Michaelmas* Term, 1826, a verdict was found for the plaintiffs for the damages mentioned in the declaration, subject to the taxation of certain bills of costs of the plaintiffs, as between attorney and client; leave being reserved to the defendant to move to enter a nonsuit on a point of law; which afterwards, by the permission and direction of the Court, and by consent of both parties, it was agreed should be presented for the opinion of the Court on the following case:—

The plaintiffs procured for one *J. E.* the loan of 1000*l.*, on a bill for 3500*l.* accepted by the defendant. With the consent of *P.*, the lender, and *J.E.*, the bill was left in the hands of the plaintiffs, as security for the repayment of the money advanced. *J. E.* being indebted to the plaintiffs, afterwards wrote to them as follows:—"The bill of 3500*l.* you will please to hold, subject to the 1000*l.*, as also for any advances or law expenses you have against me." The defendant fraudulently obtained the bill out of the custody of the plaintiffs. *P.* sued him in trover, and, by the award of an arbitrator, recovered the sum he advanced:—*Held*, that, notwithstanding the recovery by *P.*, the plaintiffs were also entitled to recover in trover against the defendant, the amount due to them from *J. E.*

"The bill of exchange, for the conversion of which the action was brought, was drawn on, and dated, the 5th *November*, 1821, by one *Thomas Claughton*, upon the defendant, requesting him, eighteen months after date, to pay to the said *Thomas Claughton's* order 3500*l.*, value received; which bill was afterwards, and before its negotiation, accepted by the defendant. The bill having been indorsed by *Claughton*, he, on the 8th *December*, 1821, delivered the same, with other bills of a like description, to one *Thomas Farquharson*, who, with his consent, delivered such bills to one *John Everth*; for the purpose of raising money thereon, to be employed, partly in making up the capital of *Everth* in a gun manufactory in which he was interested, and for which *Claughton* engaged to advance funds to a larger amount than the bill in question, and partly for other purposes of *Claughton*, in which *Everth* had no concern.

"In the month of *February*, 1822, *Everth* applied to the banking-house of Sir *Peter Pole & Co.*, of *London*, and endeavoured to prevail upon them to discount the bill;

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but they refused to do so. He then requested them to lend him 1000*l.* upon the security of the bill, stating that he was concerned in a gun manufactory, and that, unless he could obtain the advance of that sum, the workmen employed therein would be obliged to stop for want of funds. The bankers thereupon consented to advance to *Everth* the sum of 1000*l.*, in manner after-mentioned, upon the security of the bill; and it was agreed between *Everth* and the bankers, that, inasmuch as *Everth* had not at that time any account at the said banking-house, the amount of the said advance should be debited in the account of the plaintiff *Knight*, kept by him at the said bankers', he being the solicitor both of the bankers and of *Everth*; and that the bill should be deposited with *Knight*, as agent for the said bankers, until the said sum of 1000*l.* should be repaid by *Everth*. The bill was accordingly placed in the hands of *Knight*, for that purpose; and, on the 29th *March*, the money was advanced.

" On the 2d *April*, 1822, *Everth* addressed a letter to the plaintiff *Knight*, of which the following is a copy:—

" ' My Dear Sir,—The bill of 3500*l.*, say *three thousand five hundred* pounds, drawn by *Thomas Claughton* upon *Thomas Legh*, of *Lime Park*, upon which you were kind enough, at Mr. *Pullen's* request, to procure me the advance of *one thousand* pounds from my friends Sir *Peter Pole*, Bart., *& Co.*, you will please to hold, subject of course to that 1000*l.*, as also for any advances or law expenses you have against me, or that may be advanced or incurred on my account, or that of the patent gun-factory, for which purpose, more particularly, the bill was handed to me.

" ' From the conversation which took place with Mr. *Claughton* on *Sunday* last, I should not be surprised if proceedings should be instituted by that gentleman against my friend Mr. *Farquharson*, his former agent,

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against whom he appears to be much irritated, without, as far as I can see, any adequate cause; and, in that event, he must necessarily require some professional assistance, and, as I know from experience he cannot be in more able hands than yours and my friend *Fyson's*, I shall feel obliged by your acting as his solicitors, and I will engage to pay all the expenses you may incur on his account, arising out of such proceedings; for which also you will hold the bill as your security. Your obliged— *John Everth.*'

"Prior to and at the date of the above letter, *Everth* was under acceptances to a large amount, exceeding the amount of the bill in question; of which acceptances the plaintiffs were aware; none of which were ever paid by him, *Everth*, but all afterwards taken up by the defendant *Legh*.

"At the time of the date of the letter, the plaintiffs were, and for many years previously had been, the solicitors for *Everth*, who was then indebted to them in a considerable sum, for professional business transacted on his account, and became further indebted to them, subsequently to the date of the said letter, both on his account, and also in respect of the gun-factory.

"In the month of *August*, 1822, *Everth* applied to the plaintiff *Knight*, stating that a person of the name of *Thornhill* could get the bill discounted, provided the parties were satisfied that the hand-writing of the drawer and acceptor were genuine; and requested the plaintiff *Knight* to entrust the bill with *Thornhill* to get the same discounted; which *Knight* at first refused; but, afterwards, with the approbation of Sir *Peter Pole & Co.*, consented to do so, and did for that purpose deliver the bill to *Thornhill*.

"The bill was afterwards taken by one *Burford*, who was employed for that purpose by *Thornhill*, to the banking-house of Messrs. *Coutts & Co.*, the bankers of the defendant, and shewn to Sir *Edmund Antrobus*, one of the part-

ners of that firm, to ascertain whether the acceptance of it was in the hand-writing of the defendant. Thereupon one *Sweetman*, who was authorized by *Claughton* to seize and detain the bill, asked Sir *Edmund Antrobus* to let him look at the indorsement upon the bill, and took it out of the hand of the said Sir *Edmund Antrobus*, and afterwards went away with the bill, and, by the authority of the defendant, detained it; and the Jury found that the defendant thereby converted the bill to his own use.

"The said sum of 1000*l.*, so advanced by Sir *Peter Pole & Co.*, still remaining due and unpaid to them, they, in *Easter* Term, 1824, brought an action of trover against the defendant and the said *Thomas Claughton*, for such conversion as aforesaid, in the Court of *King's Bench;* which cause, being, by order of the said Court, referred to a barrister (a *nolle prosequi* being first entered as to *Claughton*), the arbitrator, on the 7th *November*, 1825, did, by his award, duly made, find and award, that the defendant was guilty of the premises laid to his charge in and by the declaration in the said action of Sir *Peter Pole & Co.*, and that they had thereby sustained damages to the sum of 1182*l.* 9*s.* 4*d.*, being the amount of the said sum of 1000*l.*, and damages, which he awarded and adjudged in respect of the premises; and did further award and order the defendant, on a certain day therein mentioned, to pay to the plaintiffs in the said action, at the office of Messrs. *Knight & Fyson*, the said sum of 1182*l.* 9*s.* 4*d.*, and also certain costs in the award mentioned; which sum of money and costs were paid accordingly: and the arbitrator, by his award, recited, that, on the hearing of the arbitration, the plaintiffs, Sir *Peter Pole & Co.*, did propose to produce before him evidence to prove that certain persons, other than themselves, the said plaintiffs, had claims upon, and were interested in, the said bill, and that, if the same, when it arrived at maturity, or afterwards, had been paid in full, part of the money so paid would have been paid to

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and for the use of such other persons. The arbitrator, therefore, made known, that he, the arbitrator, refused to receive such evidence, and that he had not awarded any damages against the defendant in respect of the claims of any persons other than the plaintiffs in the said cause, *viz.* Sir *Peter Pole & Co.*

"It was left by the Lord Chief Justice to the Jury, with a direction, that, if they thought that the plaintiffs were ignorant of the limited authority of *Everth*, and had no reason to suspect it, they should find for the plaintiffs; if otherwise, for the defendant; and the Jury found for the plaintiffs.

"The question for the opinion of the Court was, whether the plaintiffs were entitled to recover damages, to the extent of their lien upon the bill, for the conversion thereof by the defendant, as stated in the case. If the Court should be of opinion that the plaintiffs were entitled to recover, the verdict was to stand; if not, a nonsuit was to be entered."

The case now came on for argument (*a*).

Mr. Serjeant *Wilde*, for the plaintiffs, submitted that they not only had the original possession of the bill, but it was delivered to *Knight* for a special purpose, *viz.* as agent for Sir *Peter Pole & Co.* until the sum of 1000*l.*, advanced by them to *Everth* should be repaid; and the bill having been obtained from *Knight* by fraud, and detained by the order of the defendant, the Jury were warranted in finding that he had thereby converted it to his

(*a*) The Court observed, that, the cause was tried long since; and said, that in future the rule (*vide* 1 Tidd, 9 Ed. 504) which requires special cases made at *Nisi Prius*, to be set down for argument within the first four days of the succeeding Term, should be strictly adhered to; and that they shall not be set down afterwards, unless a special reason be assigned for the postponement: otherwise, the verdict found at the trial must stand.

own use. But independently of this, by the terms of *Everth's* letter to *Knight*, on the 2d *April*, the plaintiffs acquired a lien on the bill, beyond the amount of the sum advanced by *Pole & Co.*, for any advances or law expenses they, the plaintiffs, had or might thereafter have against *Everth*, on account of the gun-factory. They had, therefore, not a bare manual possession of the bill, but a possession coupled with an interest; and even if Sir *Peter Pole & Co.* had a claim on the bill to the amount of the sum advanced by them, yet such claim was subject to the prior right of the plaintiffs, who had clearly a primary and preferable lien; or, at all events, such an interest as would enable them to maintain trover against a wrong-doer. Although Sir *Peter Pole & Co.* recovered damages in the action of trover brought by them against the defendant, yet they recovered by virtue of an award; and, consequently, there has been no judgment. The case of *Morris* v. *Robinson* (*a*) seems to be expressly in point, and decisive of the present. There, the owners of a cargo brought an action on the case against the owners of a ship, for wrongfully selling the cargo, instead of carrying it to *London*, according to their contract, and the declaration contained a count in trover. The plaintiffs recovered a general verdict for the value of the ship and freight, which was one-fifth of the value of the cargo. They afterwards, brought an action for money had and received, against the purchaser of the goods; and it was held, that the recovery against the owners of the ship was no bar to the latter action. And Mr. Justice *Bayley* there said (*b*): " The plaintiffs brought an action against the owners, for the breach of their duty as carriers, with a count in trover. The Jury might, on that count, have given the full value of the goods, in da-

(*a*) 3 Barn. & Cress. 196; *S. C.* 5 Dow. & Ryl. 34.
(*b*) 3 Barn. & Cress. 205.

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mages; but their power on the special counts was restricted to a certain amount, and the verdict was restricted to that amount. *No judgment* has been entered up, and therefore there has been no actual satisfaction. If concurrent actions had been brought, that against the owners could not have barred the other; why then should it have that effect because they have been brought at different times? If, indeed, the plaintiffs were to recover the full value of the goods in each action, a Court of equity would interfere to prevent them from having a double satisfaction; but there is nothing in the former action which can, in a Court of law, prevent the recovery in this." And Mr. Justice *Holroyd* said (*a*): "Where, in trover, the full value of the article has been recovered, it has been held that the property is changed by judgment and satisfaction of the damages. But, unless the full amount is recovered, it would not bar even other actions in trover. Here, it is plain, that the full value had not been recovered on the count in trover. In an action against a sheriff for an escape, small damages are often given, on the ground that the debt is not extinguished: and the whole amount may afterwards be recovered, notwithstanding the recovery against the sheriff. The former action brought by these plaintiffs against the ship-owners is not, then, any legal ground for diminishing the sum to be recovered in this." And Mr. Justice *Littledale* said (*b*): "As to the recovery in the former action; in the *first* place, there has been no judgment in that case; and, if one party attempts to avail himself of the technical effect of such a recovery, the other may set up a technical answer, *viz.* that judgment has not been entered up. But an action of trover is clearly no bar, unless the full value has been recovered." Here, if Sir *Peter Pole & Co.* had not recovered in their action against the defendant, there can be no doubt but that the plain-

(*a*) 3 Barn. & Cress. 206. (*b*) Id. 207.

tiffs might maintain trover; and, as the arbitrator awarded Sir *Peter Pole & Co.* less damages than the amount of the bill, and which only related to the plaintiffs in that particular suit, it could not prevent the present plaintiffs from suing in this action; for they had still a sufficient title in the bill to maintain trover, having a lien upon it beyond the amount of the damages recovered by Sir *Peter Pole & Co.*

Mr. Serjeant *Peake, contrà.*—It is necessary to look at the relative situations of the plaintiffs and Sir *Peter Pole & Co.* *Everth* placed the bill in *Knight's* hands, as agent for the bankers, who advanced 1000*l.* upon it. *Knight*, therefore, must be considered as a mere bailee for Sir *Peter Pole & Co.*; he had no interest beyond it; and, when he parted with the possession of the bill, although he might previously have had such an interest in it as to enable him to maintain trover, and though he might originally have had a lien upon it, yet such lien, and consequently his interest, were put an end to when the bill was given up to *Thornhill.* The only interest the plaintiffs acquired by *Everth's* letter was, a lien on the bill, to the amount of the sum advanced by Sir *Peter Pole & Co.*, as well as for any advances or charges they had against *Everth*; but that did not divest Sir *Peter Pole & Co's.* right to sue on the bill, and *Knight* would have been bound to give it up to them for the purpose of suing, if they had required and demanded it, if he had retained it in his possession. They had the primary and larger interest; and when the bill got into the hands of a third person, whether it were fraudulently obtained or not, Sir *Peter Pole & Co.*, and not *Knight*, were authorized to sue for its conversion; which they accordingly did; and the award made by the arbitrator in their favour, is conclusive to shew that the property in the bill was in them. Two actions cannot be brought, by two distinct parties, to recover damages for the conversion of the same instrument at

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one and the same time: and here, the parties claiming in different rights, both could not have a property in the bill. And, as Sir *Peter Pole & Co.* recovered damages in their action, the plaintiffs cannot now be said to have a sufficient special property in the bill to enable them to maintain trover; and, although they might once have had such special property, yet the parties who had the general interest in it, *viz.* Sir *Peter Pole & Co.*, might assert their right and recover accordingly, as they had a paramount property. In the case of personalty, a special property may be in one, as in the instance of carriers, while the absolute right exists in another; and, where a competition arises between those two rights, the latter must prevail. So, here, although the plaintiffs might have had a special property in the bill, the absolute right was in Sir *Peter Pole & Co.*, who had made the advance upon it, and for whom *Knight* held it as agent or trustee. Although it has been objected, that there was no judgment in the action brought against the defendant by Sir *Peter Pole & Co.*, yet that is immaterial, as the award is equally conclusive and binding on the parties. The case of *Morris* v. *Robinson* cannot affect this; for, although there there were two different actions, and for different causes, they were brought by the same plaintiffs; and all the Court there decided, was, that, as they had not recovered the full value in the action of trover against the ship-owners for wrongfully selling the cargo, they were not thereby precluded from suing the purchaser of the goods, in an action for money had and received. Here, however, two distinct actions were brought by two separate parties, for the conversion of the same bill of exchange, the plaintiffs in the former of which had a paramount title, and the plaintiffs in the latter only a general property, and were the mere agents of the parties first suing; and they were also guilty of a violation of their duty, by allowing the bill to go out of their hands. The

case of *Gordon* v. *Harper* (*a*) is a direct authority to shew, that, in order to entitle a party to maintain trover, he must have the right of possession as well as of property; and here, the plaintiffs had not such a right of possession in the bill in question, as to entitle them to sue the defendant in trover for its conversion.

Mr. Serjeant *Wilde*, in reply, was stopped by the Court.

Lord Chief Justice BEST.—I fully assent to the last proposition of my brother *Peake*, that, to enable a party to sue in *trover*, he must have either a general or a special property in the article, for the detention of which damages are sought to be recovered, as well as a right of possession; and I am of opinion, that, under the circumstances of this case, the plaintiffs had a property in the bill at the time of the commencement of the action, and also a right to its possession. The terms on which the bill was deposited with *Knight*, have not been sufficiently attended to. It was not left in his hands merely as agent to Sir *Peter Pole & Co.* That was merely descriptive of his character. He held it for his own security, as the amount of the sum advanced by the bankers was not debited to *Everth*, but to *Knight*, and his account was charged accordingly with the 1000*l.*, it being agreed that he should hold the bill until that sum should be repaid by *Everth*. *Knight*, therefore, was entitled to hold the bill in his own right as against *Everth;* and he had also a right to hold it as against Sir *Peter Pole & Co.*, as a security for the repayment of the sum advanced by them, they having charged his account with it, and being entitled to call upon him to pay it. I, therefore, cannot agree that *Knight* held the bill merely as the agent of the bankers; but I think he held it on his own account, as a security, in case they should call on him to pay the money advanced to *Everth;*

(*a*) 7 Term Rep. 9.

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and even if *Knight* had, in the first instance, held the bill as agent of Sir *Peter Pole & Co.*, still he had the actual possession, and was such a bailee as to entitle him to maintain *trover* against a wrong-doer. If a party originally hold a bill on one account, it may be afterwards placed to another; and, although *Knight* might be considered as the mere agent of the bankers, and, at first, held the bill as such, until their debt was paid; yet, the instant that was satisfied, he had a right to hold it as a security for his bill of costs, or for advances made to *Everth;* and this is evident from the terms of the letter written by *Everth* to *Knight* on the 2d *April*, 1822. When, therefore, Sir *Peter Pole & Co.* were paid the sum awarded to them by the abitrator, their right to the bill ceased, and, *eo instanti*, the plaintiff's claim arose; and this was previously to the commencement of this action. There is, consequently, no objection to it, either in point of form or substance, as the bill was placed in *Knight's* hands as a security for professional services previously performed. But it has been strongly insisted, that the plaintiffs cannot recover on the bill, as Sir *Peter Pole & Co.* have recovered damages in a former action of *trover* commenced by them against the defendant on the same bill. I very much doubt whether Sir *Peter Pole & Co.* could, by law, maintain that action, as they had no right of possession. It certainly would have been far better if the action had been brought in the name of *Knight*, as he would have been entitled to recover the 1000*l.*, as well as all that was due to him from *Everth*, on whose account he held the bill. But the arbitrator has most properly, in the action brought by Sir *Peter Pole & Co.*, limited the damages to them, according to their interest in the bill. But, even supposing that the bankers were entitled to maintain an action for the conversion of the bill, it would not prevent another, who has a distinct claim on the same bill, from suing also. The case of *Morris* v. *Robinson* is expressly in point, to shew that

the same party may maintain two actions against separate persons, in respect of the same claim, where he is not compensated by the party first sued. This, however, is a far stronger case, for Sir *Peter Pole & Co.*, who sued in the first action, merely received a compensation in damages commensurate with the injury they had sustained through the wrongful conversion of the bill; and surely that ought not to prevent the present plaintiffs from suing the defendant for a distinct and separate injury, although it arises out of the same transaction. I, therefore, think, that, in justice, they were entitled to recover; and that, independently of any authority, there was no legal objection to their suing in *trover*, as they had a general property in the bill previously to the commencement of the action; for, although *Knight* might have originally held it as trustee for Sir *Peter Pole & Co.*, yet *Everth* subsequently gave him a further lien on it for advances or law expenses then or afterwards to be incurred: and, as it was fraudulently procured from *Knight*, and detained by the authority of the defendant, the plaintiffs were entitled to recover.

Mr. Justice PARK.—I am of the same opinion. The whole case turns on the commencement of *Everth's* letter to the plaintiff *Knight*, of the 2d *April*, 1822, *viz.* "The bill of 3,500*l.* drawn by *Thomas Claughton* upon *Thomas Legh*, upon which you were kind enough to procure me the advance of 1000*l.* from Sir *Peter Pole & Co.*, you will please to hold, subject of course to that 1000*l.*, *as also for any advances or law expenses* you have against me, or that may be advanced or incurred on my account, or that of the patent gun-factory, for which purpose, more particularly, the bill was handed to me." A lien was then created on the bill, which was in the plaintiffs' hands, and they were entitled to hold it till they had obtained full remuneration for their professional services and advances. It is true, that the plaintiffs might have brought an action for the whole demand; and, although Sir *Peter Pole &*

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Co. recovered damages to the extent of their interest in the bill, that will not prevent the plaintiffs from suing, as they had a distinct and separate demand by virtue of their lien.

Mr. Justice BURROUGH concurred.

Mr. Justice GASELEE.—There is no doubt, but that, in justice, Sir *Peter Pole & Co.* were entitled to recover the sum of 1000*l.*, advanced by them to *Everth* on the security of the bill; and the plaintiffs were also entitled to recover for their advances or law expenses. In point of law, therefore, two actions might have been maintained; but, whether Sir *Peter Pole & Co.* had a right to sue the defendant in the first action, it is not for us now to inquire. It is true, the defendant is charged with, and liable to pay, the costs of both actions; but that is his own fault; for, when the first was referred, he might have allowed the arbitrator to receive evidence as to the nature of the claim of the present plaintiffs. It is, therefore, no hardship on the defendant. I do not agree, that the general property in the bill was in Sir *Peter Pole & Co.* They had only a special property in it. It has been said, that the plaintiffs only held the bill as agents. Admitting that to be so, they were only agents until Sir *Peter Pole & Co.* were paid the sum they had advanced; and, when that was done, the plaintiffs had an individual and independent claim on it, as agents for *Everth*; and, although it was originally deposited with *Knight* for the advance made by Sir *Peter Pole & Co.*, yet *Everth*, in his letter to *Knight*, said, "you will please to hold the bill, subject of course to the 1000*l.*, *as also for any advances or law expenses you have against me.* That gave the plaintiffs a general property in the bill, which was in the actual and rightful possession of *Knight*, until it was fraudulently obtained from him. I am, therefore, clearly of opinion, that the verdict found for the plaintiffs must stand.

Postea to the plaintiffs.

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PRICE and Another, Assignees of LATHAM, a Bankrupt, *v.* HELYAR, Esq., Sheriff of *Somerset*.

Saturday, May 3*d*.

If a sheriff take goods in execution after an act of bankruptcy committed by the party against whom such execution is sued out, the sheriff is liable to the assignees, in trover, although he had no notice of the act of bankruptcy, and although the commission did not issue until nearly two months after the execution,—on the ground, that the property of a bankrupt vests in his assignees, from the act of bankruptcy, by relation:—and this although the goods seized were not removed from the premises, but were only detained there until the amount directed to be levied was paid by the bankrupt to the sheriff.

THIS was an action of trover for goods, brought by the plaintiffs, assignees of the estate and effects of *Latham*, a bankrupt, against the defendant, late sheriff of the county of *Somerset*.

At the trial, before Mr. Justice *Burrough*, at the last Spring Assizes for that county, a verdict was found for the plaintiffs, damages, 186*l*. 2*s*. 9*d*., subject to the opinion of this Court on the following case:—

"*Latham*, the bankrupt, for several years before, and up to the time of issuing the commission herein-after mentioned, carried on the business of a woollen-draper at *Bath*. The acts of bankruptcy were committed by him in the months of *August*, *September*, and *October*, 1826. On the 14th *November*, 1826, the defendant, then being sheriff of the county of *Somerset*, by virtue of a *fieri facias*, issued at the suit of one *W. H. Maund*, against the bankrupt, returnable in eight days of *St. Martin*, seized in execution certain effects of the bankrupt. The officer, in the afternoon, took possession of the goods, in *Latham's* house, and retained possession there until the following morning, when, on the bankrupt's paying him the sum of 71*l*., being a sum sufficient to pay the amount of the damages ordered to be levied, but somewhat less than the amount which might have been levied for the poundage, &c., he relinquished such possession. The officer stated, that he did nothing to the goods, but that he should have proceeded to a sale, if the bankrupt had not paid him the money. The judgment on which the *fieri facias* was issued, was a judgment by default, and the damages had been assessed upon a writ of inquiry. On the 15th *November*, 1826, the defendant, then being sheriff of *Somerset*, also seized and took in execution, in *Latham's* house, certain

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other effects of the bankrupt, being part of those for which this action was brought, by virtue of another *fieri facias*, issued against the bankrupt, at the suit of one *William Luce*, founded on a judgment upon a *cognovit;* which writ was returnable on *Tuesday* next after eight days of *St. Martin*. The officer remained in possession of the goods two days, at the end of which time the bankrupt paid him 115*l.* 2*s.* 9*d.*, the amount ordered to be levied, when he relinquished possession. The officer did nothing to the goods but take and keep possession thereof as aforesaid: but he stated, that he would have proceeded to a sale, but for such payment. On the 17th *November*, 1826, the sheriff paid over to *Maund's* attorney, and, on the 25th, to *Luce's* attorney, the respective sums ordered to be levied, in obedience to the writs. On the 11th *January*, 1827, a commission of bankrupt issued against *Latham;* and he was declared a bankrupt on the 24th of the same month. Neither the sheriff nor his officers knew, or had any notice, of any act of bankruptcy by *Latham*, at the time of the respective executions, or at the time of the payment of the money to the respective plaintiffs in the executions. The first intimation of the commission, was communicated by the plaintiff's attorney to the under-sheriff, by letter, on the 18th *January*, in which he stated that he had issued a commission against *Latham*, and that he had considered it prudent to give the under-sheriff the earliest information, and to inform him that the sheriff would be called upon to refund the amount paid on the above two executions. To this letter, the under-sheriff immediately returned an answer, stating that such amount had been paid over to the attornies for the plaintiffs in the respective suits.

"The question for the opinion of the Court was, whether, under the above circumstances, the action was maintainable against the sheriff. If the Court should be of opinion in the affirmative, the verdict was to stand; but, if the Court should be of opinion that the action was not maintainable, a nonsuit was to be entered."

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The case came on for argument on a former day in this Term, when—

Mr. Serjeant *Stephen*, for the plaintiffs, submitted,—*First*, that the property in the goods seized under the executions, was clearly in them, as, by the policy of the bankrupt laws, all the property of the bankrupt vests in his assignees by the assignment, from the time of the act of bankruptcy committed, by relation.—*Secondly*, that there was a complete conversion of the goods by the defendant, as sheriff; and although it may be said that he seized them by virtue of his office, and merely detained them, as they were not removed off the premises; yet the officer said that he should have proceeded to a sale, if the bankrupt had not paid him the amount of the damages directed to be levied. In *M'Combie* v. *Davies* (*a*), it was held, that taking the property of another by assignment from one who had no authority to dispose of it, is a conversion; and Lord *Ellenborough* there said, "According to Lord *Holt*, in *Baldwin* v. *Cole* (*b*), the very assuming to one's self the property and right of disposing of another man's goods, is a conversion; and certainly a man is guilty of a conversion who takes my property by assignment from another who has no authority to dispose of it; for what is that but assisting that other in carrying his wrongful act into effect." Although in *Wyatt* v. *Blades*, where, in an action of trover against the sheriff for taking the goods of a bankrupt in execution, after a secret act of bankruptcy, and carrying them to a broker's, his Lordship said (*c*), that, "had the goods not been removed, it would have been difficult to say there was any conversion;" yet there, a notice was served on the sheriff not to sell the goods, as they belonged to the assignees; and in consequence they were not sold, but remained at the broker's; whilst here, the goods were substan-

(*a*) 6 East, 538. (*b*) 6 Mod. 212. (*c*) 3 Camp. 396.

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tively sold, as the bankrupt was obliged to redeem them, by paying the officer the full amount of the sums directed to be levied, the defendant having assumed and exercised an express dominion over them. In *Shipwick* v. *Blanchard* (*a*), it was held, that, if a party pay money in order to redeem his goods from a wrongful distress for rent, he may maintain trover against the wrong-doer; and here, there was not only a seizure and detention by the sheriff, but the bankrupt was actually obliged to redeem the goods in order to prevent a sale; and there can be no doubt but that the executions were tortious as against the plaintiffs. It may be said that it is an act of hardship and injustice to render the sheriff liable, as he acted in obedience to the process delivered to him to be executed according to law, and had received no notice of an act of bankruptcy having been previously committed, nor had he any means of ascertaining that fact. The plausibility of that argument might have some weight, if there were not parallel cases, in which a sheriff is rendered equally responsible. In the case of bail, the sheriff is bound to accept a bail-bond with reasonable and sufficient sureties. He has no option. If the bail do not justify, the plaintiff in the suit looks to the sheriff; and if, on the expiration of the rule to bring in the body, the sheriff has not got the defendant in custody, or put in and perfected special bail, he is in contempt of Court, and liable to an attachment, which is in its nature a criminal process. So, if the sureties on the bail-bond turn out to be insufficient, the sheriff alone is liable. Further, a sheriff is responsible, if he by mistake take the goods of *A. B.* under an execution, instead of those of *C. D.*, although it might be impossible for him to know or ascertain in whom the property in such goods might be. If the defendant had been an ordinary person, no doubt

(*a*) 6 Term Rep. 298.

could have existed; for, if a man commit a trespass, as the agent, or by the command, of another, he is still liable, although he might have acted in ignorance. So, it is the duty of a servant to obey the orders of his master; and yet he is liable in trespass to the party injured, notwithstanding he may have done the act in the assertion of his master's right. It would be no defence in such an action, for a servant to say that he acted under the command of his master; and he is liable not only jointly with his master, but, if the latter cannot satisfy the whole of the damages, the person of the servant is liable, and he cannot recover contribution from his master. The law only looks to the existing rights of parties, and its object is to give effect to such rights. It will not sanction an illegal transaction, although effected through ignorance, or at the command of a superior; and, if so, although the defendant acted in his character of sheriff, yet, as the bankrupt laws have made no exception in his favour, he must be bound by them, although he was not aware that an act of bankruptcy had been committed by *Latham* at the time the goods were seized under the writs of execution. But the case of *Potter* v. *Starkie* (*a*), cited in *Stephens* v. *Elwall* (*b*), is precisely in point, where the Court of *Exchequer* held, that the sheriff was liable in *trover*, though he seized, sold, and paid over the money, before the commission issued, and before any notice; the Court saying that this necessarily followed from *Cooper* v. *Chitty* (*c*), for it was an unlawful interference with another's goods. The authority of *Potter* v. *Starkie* has been since recognized and adopted by several text writers, and particularly by Mr. *Starkie* in his *Treatise on Evidence* (*d*), and Mr. *Eden* in his *Treatise on the Bankrupt Laws* (*e*); and although the

(*a*) Exch. M. T. 1807.
(*b*) 4 Mau. & Selw. 260.
(*c*) 1 Burr. 20.
(*d*) Part IV. page 170.
(*e*) 2d Edit. 333.

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circumstances in *Cooper* v. *Chitty* differ from the present, as there the sheriff did not sell until *after* the commission was issued; yet, as the act of bankruptcy was committed previously to the seizure, though it was done in secret, and he was wholly ignorant of it, the Court held him to be liable to the assignees, in trover. But the true principle on which that case was decided, was, the distinction taken by Lord *Mansfield* between trespass and trover. A sheriff may not be a wrong-doer by relation, so as to subject himself to heavy damages in an action of trespass; and, yet, he may be amenable in trover. If he could be considered a trespasser by relation, it would savour of crime, and might make him amenable to an indictment, as well as to special, or even vindictive damages. Still, however, he might be liable to an action at the suit of a party, to try a civil right. His Lordship, in the report of the case of *Cooper* v. *Chitty*, by *Burrow*, is made to say, that (*a*) "trover is in form, a fiction; in substance, a remedy to recover the value of personal chattels wrongfully converted by another to his own use: and has been brought in many cases, where, in truth, the defendant has got the possession lawfully;—that it is an action of *tort*, and that the whole tort consists in the wrongful conversion, for which damages are to be recovered, and not the seizure;"—that (*b*), "though the statutes concerning bankrupts rescind all contracts and executions not completed before the act of bankruptcy, and vest the property of the bankrupt in the assignees, by relation, in order to an equal division of his estate among his creditors, yet they do not make men trespassers or criminal by relation, who have innocently received goods from him, or executed legal process, not knowing of an act of bankruptcy;"—that (*c*) "men who act innocently at the time, are not made criminals by relation;—that what they did was innocent, and in that sense lawful; but that, as

(*a*) Burr. 31. (*b*) Id. 33, (*c*) Id. 35.

a ground to support a wrongful conversion by sale, after a commission publicly taken out, and an actual assignment made, it was not lawful." So, in the report in Sir *W. Blackstone*, his Lordship, after defining the form and substance of an action of trover, said (*a*): "The defendants are not excusable, for, had the sale been *immediately* after the seizure, still the sheriffs would have been liable;" and, although the Court in the subsequent case of *Timbrell* v. *Mills* (*b*), are said to have held the contrary, and declared that it was allowed in *Cooper* v. *Chitty*, that, if the sheriff levied the money and paid it to the plaintiff before any commission issued, and without notice of the act of bankruptcy, he would, at all events, be safe; yet, that must be considered extra-judicial, as the whole question in *Timbrell* v. *Mills* turned on a false return made by the under-sheriff, for which the sheriff was held amenable. Mr. Justice *Ashhurst*, in delivering the judgment of the Court in *Smith* v. *Milles*, said (*c*), "Lord *Mansfield* lays down the true ground of distinction between the action of trover and the action of trespass, as applied to this case;" and, although it was there held, that trespass would not lie by assignees against a sheriff, for taking the goods of a bankrupt in execution, after an act of bankruptcy, and before the issuing of the commission; yet, as Mr. Justice *Ashhurst* observed: "The plaintiffs are not injured, as it is competent to them to recover the value of the goods, by bringing a proper action, namely, an action of trover; but the officer shall not be harassed by this species of action, in which the Jury *might* give vindictive damages."

Mr. Serjeant *Merewether*, for the defendant. It must be admitted as a clear proposition, that, by the assignment, the property in a bankrupt's goods is vested in his assignees, by relation, from the time of the act of bankruptcy; but here

(*a*) 1 Sir W. Bl., 69. (*b*) Id. 205. (*c*) 1 Term Rep. 481.

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there has been no conversion by the sheriff, as there was no actual removal of the goods. The case of *Wyatt* v. *Blades* is an authority expressly in point; whilst those of *Shipwick* v. *Blanchard*, *M'Combie* v. *Davies*, and *Baldwin* v. *Cole*, do not apply, nor affect the present question, as there the conversions were by individuals, and not by persons acting in the official character of sheriff; and all that was established by these latter cases, was, that, if a party, by assignment or seizure, take the goods of another, and exercise a dominion over them, he is thereby guilty of a conversion, if the person assigning or authorizing the seizure, had no authority so to do. Here, however, the true question is, whether a sheriff who enters and seizes goods in the execution of legal process, and by virtue and authority of his office, is not to be considered as standing in a situation wholly different from that of an individual who acts voluntarily and without compulsion of law. There can be no doubt but that the sheriff was justified in making the seizure under the writs; and, if so, he was warranted in raising a sum sufficient to pay the amount of the damages directed to be levied, and which was properly paid over by him to the attornies of the parties at whose instance the writs were sued out; the sheriff having at that time no notice of an act of bankruptcy having been committed, and *no commission having been sued out* until more than six weeks afterwards. It is, therefore, too much to say, that, under such circumstances, the sheriff can be deemed responsible as a wrong-doer; and, although inconvenience might not of itself be a sufficient ground to induce the Court to decide in his favour, yet it must be seen that he is placed in a situation of extreme legal hardship; for, if he had refused to execute the writs, he would have been liable to an attachment; and yet, having done so, he is still to be answerable in damages, although the seizure was legal, and the levy directed to be made before the commission was issued. Although it has been said that

a sheriff is placed in an equally hard situation with respect to bail, yet he is only bound to take *sufficient* sureties, and he holds the bond as a security. So, a servant cannot, by law, be compelled to do an illegal act; but, if he do such, he is answerable, although he acted by the command, or under the authority of his master. The case of *Potter* v. *Starkie* has been strongly relied on; but that case is distinguishable from the present, as there, the sheriff not only seized but *sold* the goods; and, although, it was said, that he was liable in trover, notwithstanding that he had no notice, and had paid over the proceeds of the sale before the commission issued, and that this necessarily followed from *Cooper* v. *Chitty*, yet the circumstances in *Potter* v. *Starkie* do not appear. The sheriff might have misconducted himself, or interfered unlawfully, in seizing the goods. But the leading principle to be collected from *Cooper* v. *Chitty*, as well as from all the previous authorities there referred to, is, that, if a sheriff act *bonâ fide*, and by virtue of his office, he cannot be deemed a wrong-doer or trespasser, by relation; and there is no substantial distinction between trespass and trover in this respect, as far as regards the sheriff. In *Bayly* v. *Bunning* (*a*), the action was brought against the bailiff, and the Court excused him, he having innocently executed the writ; and although in *Cooper* v. *Chitty*, Lord *Mansfield* said, that men who act innocently at the time, are not made criminals by relation, and, therefore, that they are excusable from being punishable as *trespassers;* yet that applied to a case where a commission had been *publicly* taken out, and an actual assignment made. The commission therefore, would have been sufficient notice of the act of bankruptcy; but here, there was no commission at the time of the seizure, or when the sums directed to be levied were paid over to the execution creditors; nor had the she-

(*a*) 1 Lev. 173.

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riff any notice of the fact of a previous act of bankruptcy having been committed by *Latham*. In *Cooper* v. *Chitty*, Lord *Mansfield* said (*a*), with respect to the argument as to inconvenience if the sheriff should be made liable, because he is obliged to sell: "The sheriff may take an indemnity from the plaintiff in case there be a doubt concerning the property of the goods;" but here, the defendant could not require it, as he thought the goods were the *bonâ fide* property of the party against whom the writs were sued out, and which he was bound to execute. Although it has been said, that the case of *Potter* v. *Starkie* has been considered an authority by text writers, that will not add to its weight; nor can it be considered as laying down any general or established principle. Besides, here, the plaintiffs have another and more effectual remedy, *viz.* by an action for money had and received against the parties to whom the sums levied in obedience to the writs, were rightfully paid over by the sheriff before the commission was issued. In *Cooper* v. *Chitty* the conversion was twenty days after the assignment (*b*). It has been said, that what fell from the Court in the subsequent case of *Timbrell* v. *Mills*, must be considered as extra-judicial, or a mere *obiter dictum*, the judgment of the Court being confined to the liability of the sheriff for the misconduct of his under-sheriff; but that argument will not apply here, for the sheriff has acted *bonâ fide*, and in the due discharge of his duty. The case of *Smith* v. *Milles* is decisive to shew that *trespass* cannot be maintained against him, and the Court will not favour a mere technical objection, so as to render him liable in another form of action. In *Lee* v. *Lopes* (*c*), in an action for money had and received, brought by assignees against the sheriff, for the value of goods sold under an execution levied after an act of bankruptcy, it was held, that the sheriff was not protected in de-

(*a*) 1 Burr. 37. (*b*) See 1 Burr. 33. (*c*) 15 East, 230.

ducting a year's rent allowed to the landlord by virtue of the statute 8 *Anne* c. 14, unless he paid it over before notice of the commission; and that, not giving such proof, he was liable for the amount to the assignees. Here, however, the defendant paid over the amount of the sums levied, not only before the commission was sued out, but without any knowledge of a previous act of bankruptcy having been committed.

Mr. Serjeant *Stephen*, in reply. The case of *Lee* v. *Lopes* is altogether distinguishable from the present, as it was an action for money had and received, and the Court said, that it lay upon the sheriff to shew that the payment was made before notice of the commission. But the case of *Potter* v. *Starkie* is precisely in point, and its authority cannot be disregarded by the Court; and, although it may somewhat have extended the principle established in *Cooper* v. *Chitty*, yet the true and only ground on which this case must be decided, is, that the sheriff is liable in *trover*, as the retention of the goods, by the officer, until the sums directed by the writs to be levied were paid, amounted to a wrongful conversion; and this, although the sheriff had no previous notice of an act of bankruptcy having been committed by *Latham*, and although no commission had then issued against him.

Cur. adv. vult.

Lord Chief Justice BEST now delivered the judgment of the Court as follows.—This was an action of trover, brought by the plaintiffs, as assignees of a bankrupt, against the defendant, as sheriff of the county of *Somerset*. In the commencement of the argument, two questions were raised—*First*, whether or not, if this were an ordinary case, and not the case of a sheriff, the defendant would have been guilty of a conversion, the goods of the bankrupt not having been removed from the premises; and

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secondly, whether or not the sheriff were excused, he having, in doing the act complained of, done nothing more than execute the process of the law, which he was bound to do. Before, however, the conclusion of the argument, it was properly admitted, that, had this been an ordinary case, there would have been no doubt but that the sale of the goods would have amounted to a conversion. The latter, therefore, is the only point that now remains to be considered. It is impossible not to see the hardship of the case, and that is the only circumstance that has given rise to any doubt. But we cannot make laws. We must take them as we find them, and expound and administer them accordingly; and, if justice be not done, it is for the Legislature to interfere, who alone are empowered to make the law what it ought to be. But, on principle, there can be no doubt in this case, as the law now stands. According to the policy of the bankrupt laws, as laid down in all the statutes, the assignment of the property of the bankrupt has relation back to the act of bankruptcy, and from that moment the bankrupt is divested of all his property, which vests in his assignees; and, if a person afterwards take or possess himself of such property, he cannot be considered to have taken the property of the bankrupt, but of his assignees, and his liability attaches accordingly. This is the necessary effect of giving the assignment a retrospective relation to the act of bankruptcy. If a sheriff, in such a case as this, seek to excuse himself, it is incumbent on him to shew us some law by which he is exonerated; and if he cannot do so, he must be considered as an ordinary individual; or as standing in the same situation as if he had been guilty of a wrongful act, by taking the property of one individual, when the writ directed him to take that of another. No statute has been referred to, nor, indeed, can any be found, in favour of a sheriff. All the *cases* are decidedly against him; and, if they were not, they would be directly in the teeth of all the statutes, and could

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not be supported. We have been extremely anxious to inquire as to the authenticity of the case of *Potter* v. *Starkie*, which has been admitted to be precisely in point; and, as it was said to be a decision of the Court of *Exchequer*, it would, of course, be entitled to great consideration. My brother *Park* has, since the argument of this case, seen the late Mr. Justice *Richardson*, who was counsel in that cause, and who says that he took a note of it, that the report of it in *Stephens* v. *Elwall* is accurate, and that the Court of *Exchequer* decided on the ground there stated, assigning as a reason, that the liability of the sheriff necessarily followed from *Cooper* v. *Chitty*; and, if that case be attentively looked at, it is quite clear that *Potter* v. *Starkie* was founded upon it. The principles in *Cooper* v. *Chitty* not only apply to this case, but fully embrace the principle on which it must be decided, particularly if the report in *Blackstone* be correct. It appears by the preface to the first volume of his reports, that that learned Judge did not give his notes the last correction he had intended, and they were not published until after his death; yet, we are well assured that there is nothing contained in any of the opinions of the Judges, or judgments of the Court, that did not fall from the bench. He certainly took most accurate notes; and although the words attributed by him to Lord *Mansfield*, in giving judgment in *Cooper* v. *Chitty*, are not to be found in the report of that case in *Burrow*, yet there is little, if any, doubt but that his Lordship used them. In speaking of the assignment and sale, he says (*a*): "The notoriety is extremely great; but had the sale been *immediately* after the seizure, still the sheriffs would have been liable." If, therefore, a sheriff sell immediately after a seizure, although he had no knowledge of any act of bankruptcy having been previously committed by the party whose goods he was

(*a*) 1 Sir W. Bl. 69.

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directed to levy upon, it will not avail him. Although in *Timbrell* v. *Mills*, it is stated, that (*a*) "the whole Court declared that it was allowed in *Cooper* v. *Chitty*, that, if the sheriff levy the money, and pay it to the plaintiff before any commission issued, and without notice of the act of bankruptcy, he will at all events be safe;" yet that is altogether inconsistent with *Cooper* v. *Chitty;* and it must be observed, that it did not fall from the Court in giving their judgment. It might very possibly be the opinion of one Judge only, and more particularly so, as it is directly at variance with what Lord *Mansfield* had before said in *Cooper* v. *Chitty*, as reported in *Burrow*, where his Lordship lays down the principle by which this case must be governed. He there took a true ground of distinction between an action of trespass and an action of trover, and shewed, that, although the former cannot be maintained, still, that the latter may; for, he said (*b*): "This action *(trover)* lies, and has been brought in many cases, where, in truth, the defendant has got the possession lawfully. Where the defendant takes them (goods) wrongfully, and by trespass, the plaintiff, if he think fit to bring this action, waives the trespass, and admits the possession to have been lawfully gotten. Hence, if the defendant deliver the thing upon demand, no damages can be recovered in this action for having taken it. This is an action of *tort*. The whole tort consists in the wrongful conversion." If, therefore, a party enter and take goods, and keep possession but for an instant, he is liable in trespass; but not so in trover, unless he proceed to a conversion. And although a sheriff may have taken goods that were not the property of the party, yet if he deliver them up on demand made, or before conversion, he cannot be answerable in damages for the taking. His Lordship then, after observing that the statutes con-

(*a*) 1 Sir W. Bl. 205. (*b*) 1 Burr. 31.

cerning bankrupts vest in the assignees all the property that the bankrupt had, at the time of the act committed, and make the sale by the commissioners good against all persons who claim by, from, or under the bankrupt, after the act of bankruptcy, and against all executions not served and executed before the act of bankruptcy, said (*a*): "Dispositions by process of law are put upon the same foot with dispositions by the party. To be valid, they must be *completed* before the act of bankruptcy." This destroys the distinction attempted to be drawn by the counsel for the defendant, between the case of a sheriff, who is compelled to act in execution of his duty, and that of a common individual. "Till the making of 19 *Geo. 2*, c. *32*," continued his Lordship, "if the bankrupt had *bonâ fide* bought goods, or negotiated a bill of exchange, and thereupon, or otherwise, in the course of trade, paid money to a fair creditor, after he himself had committed a secret act of bankruptcy, such *bonâ fide* creditor was liable to refund the money to the assignees after a commission and assignment, and the payment, though really and *bonâ fide* made to the creditor, was avoided and defeated by the secret act of bankruptcy." Taking, therefore, the whole of that together, it shews that, in the opinion of his Lordship, a person acting as sheriff, and a private individual, must be considered as standing in the same situation, and that the hardship in the one case is no greater than that in the other; as formerly, if a bankrupt had bought goods of, and paid money to, a person, *bonâ fide*, after he had committed an act of bankruptcy, such person was liable to refund the money to the assignees, although he had no knowledge that an act of bankruptcy had been previously committed. This, however, being found to be a great hardship on creditors, the Legislature remedied it by passing the statute 19 *Geo. 2*, c. *32*, by which relief was given in particular instances, as it was thereby provided that no

(*a*) 1 Burr. 32.

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creditor of a bankrupt for goods sold, or upon bills of exchange, should be liable to refund to the assignees any money received by him of the bankrupt, upon such account, in the usual and ordinary course of trade, before such creditor knew or had notice that he had become a bankrupt, or was in insolvent circumstances. "The sheriff," said Lord *Mansfield* (*a*), "acts at his peril, and is answerable for any mistake. Infinite inconveniences would arise if it were not so. To prove the taking lawful, and that, therefore, the sheriff shall not be liable to an action, several cases were cited (*b*). The fallacy of the argument from the authority of these cases turns upon using the word *lawful* equivocally in two senses. To support the act, it is not lawful; but, to excuse the mistake of the sheriff through unavoidable ignorance, it is lawful." That, therefore, shews that a sheriff is not answerable in trespass for taking or seizing the goods, but that he is answerable in trover, as he cannot support the act. "Or, in other words," said his Lordship, "the relation introduced by the statute, binds the property; but men who act innocently at the time, are not made criminals by relation; and therefore they are excusable from being punishable, by action or indictment, as trespassers. What they did was innocent, and in that sense lawful; but, as a ground to support a wrongful conversion by sale, after a commission publicly taken out, and an actual assignment made, it was not lawful." That distinction is well founded; and, from the whole of the reasoning of Lord *Mansfield*, it follows, that, although the act of taking be unlawful, and a sheriff in such case may be excusable from being punishable by action as a trespasser; yet, that a conversion by him of a bankrupt's property, after an act of bankruptcy committed, is not lawful. In *Smith* v. *Milles*, the action was trespass; but that case is confirmatory of, and rests upon, the principle established by *Cooper* v. *Chitty*; and Mr. Justice *Ashhurst*, in delivering

(*a*) 1 Burr. 33. (*b*) Id. 35.

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the judgment of the Court there, said (*a*), that, in *Cooper* v. *Chitty*, Lord *Mansfield* laid down the true ground of distinction between the action of trover and the action of trespass, *viz.*, that trover is maintainable, because the conversion, and not the taking, is the gist of the action; but that men who acted innocently at the time are not made criminal by relation, and therefore are excusable, by indictment or action, as trespassers.

A bill to amend the bankrupt laws, was read in the House of Commons, for the first time, last night; and it is to be hoped that this subject will not escape the notice of the Legislature. We can, however, only dispense the law as it now stands, and, however hard it may be thought that the sheriff should be held liable, we are clearly of opinion, that, under all the circumstances, the present action is maintainable against him.

Postea to the plaintiffs (*b*).

(*a*) 1 Term Rep. 481.

(*b*) His Lordship afterwards referred to the case of *Lazarus* v. *Waithman*, 5 B. Moore, 313, where the same point was expressly decided, and where Mr. Justice *Richardson* referred to the case of *Potter* v. *Starkie*, which the reporter, by mistake, considered to have been that of *Lyon* v. *Lamb*, the learned Judge having merely stated that it was a decision of the Court of *Exchequer*; and the case of *Stephens* v. *Elwall* was not adverted to either by the bar or the Court.

TURNER *v.* SMITH.

Saturday, May 3d.

MR. Serjeant *Peake* applied for leave to sue out a writ of *distringas*, to compel the appearance of the defendant,

The Court allowed a writ of *distringas* to be sued out under the statute 7 & 8 *Geo.* 4, c. 71, s. 5, on an affidavit of the sheriff's officer, that he could not serve the defendant personally at his house; that he believed he kept out of the way to avoid being served; and that his son told him he had left home for that purpose.

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according to the provisions of the statute 7 & 8 *Geo.* 4, c. 71, s. 5 (*a*), on an affidavit of the sheriff's officer, which stated, that he had frequently endeavoured to serve the defendant personally at his dwelling house; that he believed he kept out of the way to avoid being served; and that, on one occasion, he had seen the defendant's son, who told him that it was useless for him to call again, as his father had left home for the purpose of avoiding being served.

The Court thought the affidavit sufficient, as the officer had not only deposed to the fact that the defendant could not be personally served, but also stated that he believed the defendant kept out of the way to avoid being served, with his reason for such belief, which is all that was ever required under the late act 51 *Geo.* 3, c. 124 (*b*).

The application was accordingly —

Granted.

(*a*) By which it is enacted, "That, in case it shall be made appear to the satisfaction of the Court, or, in the vacation, of any Judge of the Court, from which original process shall issue, or into which the same shall be returnable, that the defendant could not be personally served with the summons or attachment, and that such process had been duly executed at the dwelling-house or place of abode of such defendant, that then it shall be lawful for the plaintiff, by leave of the Court, or order of such Judge, as aforesaid, to sue out a writ of *distringas*, to compel the appearance of such defendant."

(*b*) See *Downe* v. *Crewe*, 1 Marsh. 267; *S. C.* 5 Taunt. 520; *Hannam* v. *Dietrichsen*, 5 Taunt. 853; *Watmore* v. *Bruce*, 8 Taunt. 57; *Anonymous*, 8 Taunt. 171.

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A *British* Consul at a foreign port, has no authority, under the statute 6 *Geo.* 4, c. 87, s. 20, to administer an oath of the acknowledgment of a party levying a fine.

HUTCHINSON, *Ex parte.*

MR. Serjeant *Taddy*, on a former day in this Term, moved that a fine which had been levied at the instance of the applicant, might pass. It appeared that the affidavit of the taking of the acknowledgment had been sworn before the *British* Consul at *Boulogne;* that the affidavit was afterwards sent back, for the purpose of having it sworn before a magistrate; and that, on application being made to several, both at *Boulogne* and *Calais*, to administer the oath, they refused, stating, that the Consuls were now empowered to do so; and the Mayor of *Calais* said, that it was formerly done by the magistrates, that it caused them unnecessary trouble, but that there was no law in *France* by which they were bound to act in such cases. The learned Serjeant cited the statute 6 *Geo.* 4, c. 87, s. 20 (*a*), by which *British* Consuls abroad are au-

(*a*) Which,—after reciting that it was expedient that every Consul General, or Consul appointed by his Majesty at any foreign port or place, should, in all cases, have the power of administering an oath or affirmation, whenever the same should be required, and should also have power to do all such notarial acts as any Notary Public might do,—enacts, "That, from and after the passing of the act, it shall and may be lawful for any and every Consul-General appointed by his Majesty at any foreign port and place, whenever he shall be thereto required, and whenever he shall see necessary, to administer, at such foreign port or place, any oath, or take any affidavit or affirmation, from any person or persons whomsoever, and also to do and perform, at such foreign port or place, all and every notarial acts or act which any Notary Public could or might be required, and is by law empowered, to do within the United Kingdom of *Great Britain* and *Ireland;* and every such oath, affidavit, or affirmation, and every such notarial act, administered, sworn, affirmed, had, or done, by or before such Consul-General, or Consul, shall be as good, valid, and effectual, and shall be of like force and effect, to all intents and purposes, as if every such oath, affidavit, or affirmation, or notarial act, respectively, had been administered, sworn, affirmed, had, or done, before any Justice of the Peace or Notary

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thorized to administer oaths; and the case of *Pichardo* v. *Machado* (*a*) where the Judges of the Court of *King's Bench* were equally divided in opinion, as to whether or not a defendant could be held to bail on an affidavit made by a foreigner before a *British* Consul resident in a foreign country; and he distinguished that case from the present, as there the liberty of the subject was concerned, whilst this was a mere ordinary affidavit, the rejection of which would occasion great and unnecessary delay and inconvenience to the parties.

The Court were inclined to think that a Consul was not authorized by the act to administer an oath for the purpose of holding a party to bail, as even a magistrate could not do so in this country; and they were of opinion that the words at the latter part of the 20th section of the statute 6 *Geo.* 4, *viz.* that every oath or affidavit administered or sworn before a Consul, was to be of like force and effect as if it had been sworn before any Justice of the Peace or Notary Public, in any part of *Great Britain* or *Ireland*, narrowed its construction; but, on Mr. Serjeant *Taddy's* observing that the clause concluded with the words, "or before any other legal or competent authority of the like nature," they took time to consider.

Lord Chief Justice BEST now said, that the Court were of opinion that the affidavit was not sufficient; that, on looking at the general purport of the act, it only intended, to authorize Consuls abroad to administer such oaths, and to do and perform such notarial acts, as any Notary Public is by law empowered to do, and that such oath should be of the like force and effect as if it had been administered

Public, in any part of the United Kingdom of *Great Britain* or *Ireland*, or before any other legal or competent authority of the like nature."

(*a*) 4 Barn. & Cress. 884; *S. C.* 7 Dow. & Ryl. 478.

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or sworn before any Justice of the Peace or Notary Public in any part of *Great Britain* or *Ireland:* neither of whom are authorized to take the affidavit of the caption of the acknowledgment of a fine.

The learned Serjeant, therefore, took nothing by his motion (*a*).

(*a*) See *Riddell*, plaintiff; *Nash* and Others, deforciants, 8 B. Moore, 632.

SIORDET and Another *v.* HALL and Others.

Monday, May 5th.

The plaintiffs shipped goods on board a steam vessel. The bill of lading contained the usual exceptions of the act of God, &c. &c. On the evening before the vessel was expected to sail, the boiler was, according to custom, filled with water; but, in consequence of the action of frost, a pipe communicating with it burst, and the water escaping into the hold damaged the goods. In an action against the owners, it was left to the Jury to say, whether or not, in leaving the boiler filled with water in frosty weather, the owners had been guilty of negligence. They found for the plaintiffs, and the Court refused to disturb the verdict.

THIS was an action of *assumpsit*, brought against the defendants, owners of the *Superb* steam vessel trading from *London* to *Antwerp*, for damage done to a quantity of indigo shipped by the plaintiffs on board that vessel, to be carried to *Antwerp*. The declaration stated, that, on the 9th *February*, 1827, the plaintiffs caused to be shipped on board the *Superb*, certain indigo, then in good order and well conditioned, to be safely carried and taken care of by the defendants, as owners, from the river *Thames* to *Antwerp*, and there to be delivered in the like good order (the act of God and the dangers of the seas, &c. &c. excepted), and that, in consideration thereof, and of certain freight to the defendants in that behalf, they undertook to take care of, and safely carry and deliver the indigo at *Antwerp*, and assigned for breach, that, through the negligence of the defendants, the indigo became spoilt and wholly lost to the plaintiffs.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the adjourned Sittings after *Trinity* Term, 1827, it appeared, that the indigo was shipped on the 10th *February* in that year, and that the vessel was then staunch and strong, and every way fitted for the voyage; that

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water was pumped into the boiler on the evening of that day, the captain expecting to receive orders to proceed on the following morning; that it took upwards of two hours to pump the water into the boiler, and two or three hours more to heat before the steam rose sufficiently to work the vessel; that it was customary to fill the boiler the day previous to the vessel's starting; that, on the evening of *Sunday*, the 11th, the vessel was surveyed, and every thing was found perfectly safe; but that, on the following morning, a considerable quantity of water was found in the hold, and, on pumping it out, it was ascertained that the blow pipe, or filling pipe of the boiler, had burst during the night, owing to the action of frost upon it. It was proved to have been previously sound and good. The bill of lading under which the indigo was shipped, contained the usual exceptions, *viz.* the act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kinds soever. It was submitted, for the defendants, that the injury done to the indigo was attributable to the act of God, and, therefore, within the exception. His Lordship said that it was certainly the act of God that produced the frost, and that, if that were the *immediate* cause of the accident, it would have been good ground of defence; but that, if the water had been unnecessarily placed in the boiler, and left there without a fire to prevent the frost acting on the pipe, the loss could not be said to be occasioned by the act of God, but rather to arise from gross negligence in leaving the water in the boiler in frosty weather. The Jury accordingly found a verdict for the plaintiffs.

Mr. Serjeant *Taddy*, in the last *Michaelmas* Term, obtained a rule *nisi* that this verdict might be set aside, and a new trial granted, on the ground of a misdirection by his Lordship. He submitted that it should have been left to the Jury to say, whether or not the breaking of the pipe was at-

tributable to the act of God, inasmuch as the frost alone was the cause of the damage; and that, it being the constant practice to fill the boiler the evening previous to the sailing of the vessel, there was no ground for imputing negligence to the defendants or their servants, as, had the pipe not burst, the water would not have escaped.

Mr. Serjeant *Wilde* was now about to shew cause, when the Court called on—

Mr. Serjeant *Taddy* to support his rule. The accident was occasioned by the act of God, and, consequently, falls within the exception in the bill of lading. The immediate cause was, the action of the frost on the external part of the pipe, which caused it to burst; for it is well known that cold will contract iron, as heat will expand it. Although it has been said that the effect of frost might have been prevented by fire; yet this argument, if available, would tend to render useless all the exceptions in the bill of lading, as all the risks there enumerated might be prevented by the adoption of certain precautions. A convoy would be a sufficient protection from the King's enemies,—care in navigation, from rocks,—and the effect of lightning might be obviated or prevented by conductors;—but frost is beyond all human control. The meaning of the exceptions is, that the owners shall not be liable, when the injury falls within them, and there has been no actual negligence. The question then is, what was the immediate cause of the loss. It was clearly the operation of the frost on the external part of the pipe, and not the expansion of the water within it. The act of God comprehends all sudden accidents, arising from physical causes, as distinguished from human agency; and, according to the case of *Smith* v. *Sheppard* (*a*), the act must be sudden

(*a*) Abbott on Shipping, 5 Ed. 252.

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and immediate, and not remote; for, in law, *causa proxima et non remota spectatur;* and here the filling the boiler was not the immediate cause of the damage, nor was it an act of negligence, it being the invariable usage to do so the evening before the sailing of the vessel; and even if it were negligence, the boiler's having been filled would have caused no injury, unless the frost had burst the pipe.

Lord Chief Justice BEST.—I certainly intimated to the Jury a strong opinion that the loss in question was occasioned by negligence, and, when the circumstances are looked at, there can be no doubt of it. Every one knows that frost will crack iron, and that, if water be contained within it, it is the more liable to do so. The question then is, whether, by the custom or usage applicable to steam vessels, the master is justified in keeping the boiler full of water, in frosty weather, two days before the vessel starts; or, whether the owners of goods on board are to suffer, merely because it might occasion the master a little extra trouble to let the water out of the boiler on a frosty evening, and fill it the next morning. I left it to the Jury to exercise their discretion; and, although I expressed a strong opinion, it cannot be a ground for a new trial. If they had found the verdict the other way, I certainly should have been dissatisfied with it.

Mr. Justice BURROUGH (*a*).—The Jury were in full possession of the facts, and it appears to me that their verdict is perfectly right. The case of *Forward* v. *Pittard* (*b*) appears to me to be far stronger than the present. There, goods were destroyed by fire, without any actual negligence in the defendant, a carrier; and yet he was held liable, he being bound to deliver them at all events, except damaged

(*a*) 1 Term Rep. 27. (*b*) Mr. Justice Park was at chambers.

or destroyed by the act of God, a carrier being in the nature of an insurer.

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Mr. Justice GASELEE concurring—

Rule discharged.

BATTHEWS *v.* GALINDO.

Tuesday, May 6th.

THIS was an action of *assumpsit*, and brought by the plaintiff as indorsee, against the defendant as the acceptor of a bill of exchange for 11*l.* The defence was usury.

A woman who lives with a man, uses his name, and passes as his wife, is a competent witness on his behalf, in an action brought against him; as the mere circumstance of cohabitation only goes to her credit, not to her competency.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after *Trinity* Term, 1827, a female of the name of *Ann Jakers* was called for the defendant, to prove the usury, and her testimony established that fact; but, on her cross-examination, she said that she lived in the same house with the defendant, that there were several children there, but that she was not the defendant's wife, although she had gone by his name. On being asked to whom the children belonged, or if she were the mother of them, his Lordship informed her that she was not bound to answer that question. Another witness then proved that *Ann Jakers* had lived in the same house with the defendant for several years, that she had always passed by the name of *Galindo*, and that he, the witness, had called her by that name; that they had frequently been seen walking together; and that, on one occasion, they had a child with them, which the defendant admitted to be his. His Lordship was of opinion that a woman living with a man as his wife, and passing in the world as such, must be considered as being invested with the same degree of interest as if she were actually his wife; and he referred to the case of

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Campbell v. *Twemlow* (*a*), where the late Lord Chief Baron *Richards* cited a case before Lord *Kenyon*, on the *Chester* Circuit, in 1782 (*b*), where, on a trial for forgery, the prisoner called as his witness, a woman whom he had himself in Court represented to be his wife, but, afterwards, on hearing an objection taken to her competency, he denied that she was married to him; and Lord *Kenyon* would not permit him to call her, after having represented her as his wife. His Lordship therefore said, that, as it appeared that a woman in the situation of this witness had been rejected in a case affecting life, she ought not to be admitted as a witness for the purpose of protecting property; and he refused to receive the testimony of the witness *Jakers*. The Jury accordingly found a verdict for the plaintiff, for the amount of the bill.

Mr. Serjeant *E. Lawes*, in the last *Michaelmas* Term, obtained a rule *nisi* that this verdict might be set aside and a new trial granted, on the ground that the testimony of the witness had been improperly rejected, submitting that a woman or kept mistress, living with a man as his wife, is not to be considered as a married woman, or as having the same degree of interest as if she were actually his wife. In *Campbell* v. *Twemlow*, where the point was raised in argument, the Court, considering it a doubtful question, declined giving any opinion upon it; and the case there referred to by the late Lord Chief Baron is distinguishable from the present, as there, the prisoner had represented the woman to be his wife in the course of his defence in Court; but here, it was merely shewn that she passed by the defendant's name and appeared to the world as his wife.

Mr. Serjeant *Wilde* now shewed cause.—The witness

(*a*) 1 Price, 81. (*b*) Id. 83.

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was properly rejected, not because she was the mistress of the defendant, but because she resided in the same house with him, used his name, and passed in the world as his wife. The principles on which the exclusion of a wife from giving testimony, either in favour of, or against, her husband, are equally applicable to the case of a woman unmarried but cohabiting with a man by whom she is supported. And, as was said in argument, in *Campbell* v. *Twemlow* (*a*), the consequence of holding her evidence admissible, would be to afford the same advantage to her as would arise to a wife examined on behalf of her husband; for she would be contributing to the augmentation of the fund by which she is at the moment supported, by as much as the amount of the damages which might be recovered in the action on the strength of her testimony. She is, in point of fact, as completely under the control and influence of the party, as if she were his wife; and their interests are identified as fully. There, an arbitrator refused to admit, on the part of the plaintiff, the evidence of a woman who had cohabited with him for several years, and passed as his wife, but whom the plaintiff would have proved was not married to him; and, although the Court declined giving any opinion as to the competency of the witness, the award of the arbitrator being final and conclusive, all matters, both of law and fact, having been left to his decision; yet the late Lord Chief Baron, then Mr. Baron *Richards*, said (*b*): "I should certainly have acted in this case as the arbitrator has done." And he had previously cited the case before Lord *Kenyon*, where a prisoner was tried on a charge of forgery, and in the course of his defence alluded to a woman who was then in Court, and of whom he spoke as his wife, and concluded by offering her evidence in corroboration of some facts which he had stated; and when the objection of her being his wife was taken, he said that they were not in fact married; but his

(*a*) 1 Price, 83. (*b*) Id. 91.

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Lordship would not permit him to call her, after having spoken of her as his wife. That case must be considered as having been decided on mature deliberation, as it appears that the prisoner was afterwards executed. So here, the defendant had frequently spoken of the witness as his wife, had treated her as such, and allowed her to go by his name; and it is immaterial whether he had represented her to be so in a court of justice, or had merely held her out to the world as such. It is quite clear that the witness *Jakers* was not a competent witness to prove that she was not the wife of the defendant; it was incumbent on him to prove it by evidence *aliunde:* and that went to establish the reputation of her being his wife. She ought not, therefore, to have been admitted, at least until some evidence beyond her own unsupported assertion, had been adduced to shew that she was not the wife; and it is not to be assumed that she was his mistress, when the defendant himself had always held her out to the world, and treated her as his wife. It is equally clear that she was not bound to answer the question as to her affinity to the defendant's children. All that it was incumbent on the plaintiff to prove, was, that she was *apparently* the defendant's wife. He was not bound to prove the marriage. In case of her death, she would have been considered by the world as his wife. In criminal cases, wives might be guilty of perjury, in order to preserve their husbands' lives, by swearing that they were not married, if by so doing they could be admitted to give evidence. Here, the witness did not pass as the mistress of the defendant, but invariably as his wife. In *Watson* v. *Threlkeld* (*a*) Lord *Kenyon* held, that a man who represents a woman to the world as his wife, and allows her to use his name, is liable for her engagements, although the creditor know that the parties are not married. There was abundant evidence to shew that this defendant allowed the witness

(*a*) 2 Esp. N. P. C. 637.

to pass as his wife, as he permitted her to assume his name, live in the same house with him, and, in fact, form a part of his family; and such evidence would have been sufficient and conclusive to prove her his wife, in all civil proceedings, with the exception of an action for criminal conversation. The adoption of the defendant's name, coupled with cohabitation, would give her an unqualified degree of credit. She had resided in the same house with him, and passed as his wife, for several years, and continued to do so to the day of trial. It is an incontrovertible proposition, that, in all civil cases, a wife cannot be called to give evidence for or against her husband; and, if the testimony of witnesses such as the present be held admissible, it will be pregnant with mischief, and tend to operate as a surprise on parties whose just claims may be thereby defeated, and who cannot anticipate or be prepared to meet such evidence. On the ground, therefore, of public policy, as well as of morality, the testimony of this witness was most properly rejected.

Mr. Serjeant *E. Lawes*, in support of his rule, was stopped by the Court.

Mr. Justice PARK.—I am clearly of opinion that this rule must be made absolute. I think the conclusion to which the arbitrator arrived, in the case of *Campbell* v. *Twemlow*, was correct, and I agree to the particular ground on which the Court of *Exchequer* decided, *viz.* that the award was final, all matters, as well of law as of fact, having been referred. But it appears to me that that case has no bearing on the present. The mere circumstance of a woman's cohabiting with a man, only goes to her credit as a witness, but is no ground to reject her testimony altogether. I also think that Lord *Kenyon* was perfectly right in refusing to receive the evidence of the woman whom the prisoner spoke of as his wife in the course

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of his defence; and that his Lordship properly decided, that, after such a declaration in Court, he could not be allowed to say that she was his mistress.

Mr. Justice BURROUGH.—It was admitted throughout the trial, that the female called for the defendant was not his wife, though she resided in his house and passed as such. If he had been sued for a debt contracted by her before she came to live with him, might he not have disputed it? or would it not have been a good defence to an action brought to recover it, to shew that she was not his wife? Evidence of reputation is altogether out of the question, as that applies only to declarations made by persons deceased, and is not admissible *inter vivos*. The case cited by the late Lord Chief Baron *Richards*, in *Campbell* v. *Twemlow*, as having been decided by Lord *Kenyon*, does not appear to me to be at all applicable to the present. There, the prisoner at the bar, in the course of his defence, spoke of the woman as his wife, and concluded by offering her evidence in corroboration of some facts which he had stated. He could not of course be allowed to turn round and say that she was not his wife, for the purpose of having the benefit of the evidence. Besides, the case was merely put by his Lordship, by way of illustration, and not as a decision by which the case of *Campbell* v. *Twemlow* was to be governed. That case was ultimately decided on a wholly different ground; and all the Court abstained from giving any opinion on the competency or incompetency of the witness. I have frequently known, both in criminal and civil cases, kept mistresses examined as witnesses on behalf of persons with whom they were cohabiting.

Mr. Justice GASELEE.—I have never understood that be laid down, that a party may put himself in such a situation as to preclude him from saying that a female who has

passed as his wife, is not so; for instance, where goods have been supplied to her by a tradesman before cohabitation. In *Mace* v. *Cadell* (*a*) the plaintiff kept a public-house, had a licence, and said she was married to one *Penrice*, whose name she afterwards entered in the books of the Excise Office, with a note in the margin, "married;" from which time *Penrice* had the licence, and continued in the possession of the house and goods until he absconded, thereby committing an act of bankruptcy. The plaintiff first claimed the goods under a bill of sale from *Penrice*, but she afterwards claimed them as her own original property, and denied that she and *Penrice* were married; and the Court said, that, after a solemn declaration by the wife, that she was married to *Penrice*, and that these were the goods of *Penrice* in her right, she should never be allowed to say that she was not married to him, and that the goods were her sole property. That is sound law, and I lately acted upon it at *Nisi Prius*, in the case of *Griffiths* v. *Franklin* (*b*), which was an action of *assumpsit* brought by a woman who a witness stated, had, about six months before, told her that she had been married on the preceding *Thursday*, and I left it to the Jury to say whether they were satisfied that she was married. There, however, the plaintiff had made no solemn declaration, nor had she done any act confirmatory of the marriage, as in *Mace* v. *Cadell*. But the ground on which I think there ought to be a new trial in this case, is, that there was not sufficient evidence to preclude the defendant from shewing that the witness was not his wife. During the whole of the trial it was assumed that she was not so. She was called by the name of *Jakers*, and not by the name of *Galindo;* and when she was asked, whether or not she was the mother of his children, my Lord Chief Justice most properly told her that she was not

(*a*) Cowp. 231.

(*b*) See 1 Mood. & Malk. N. P. C. 146, where the case is reported on another point.

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bound to answer that question, as it would subject her to punishment in the Ecclesiastical Court. In *Campbell* v. *Twemlow*, the Court of *Exchequer* gave no opinion on this point; and even if they had, the circumstances of that case differ very materially from the present. There, the plaintiff had lived with a woman for many years as her avowed husband, and had had several children by her, and he had repeatedly conversed with various persons on the subject of the peculiar ceremony of the marriage, which he described as having taken place in the north of *Ireland*. That was an absolute avowal of the marriage; and, although the Court thought it doubtful whether or not the testimony of the woman were admissible to prove the fact of her never having been married to the plaintiff, yet they decided the case on a wholly different ground; Lord Chief Baron *Thomson* saying, that, in the view he had taken of the case, it did not seem to him to be necessary that the Court should give any opinion whether the witness rejected by the arbitrator was competent to be received or not, every thing, both of law and in fact, having been referred to the arbitrator; and Mr. Justice *Graham* said, "I shall observe the same prudent forbearance, as to giving any opinion on the admissibility of the evidence rejected, as has been adopted by my Lord Chief Baron; for it does not seem necessary to the present question, which is, whether this award should be set aside;" and Mr. Baron *Richards* added, "I shall also abstain from any opinion on the collateral point of the witness's competency. I should certainly have acted in this case as Mr. *Evans* has done." The Court, therefore, confirmed the award, but laid down no principle with respect to the present question, which they considered to be doubtful.

Lord Chief Justice BEST.—I am clearly of opinion, that my rejection of the witness at *Nisi Prius* was wrong; but I was led into error by the case referred to by the late

Lord Chief Baron in *Campbell* v. *Twemlow*, as having been decided by Lord *Kenyon*, at a time when he was in the zenith of his legal knowledge; and which I am satisfied bears directly on the point. The time or place of a party's representing a female to be his wife, appears to me to be immaterial. It is too nice a distinction; for the *effect* of the representation is alone to be looked at. Neither is it material as to the manner in which a party declares that the marriage ceremony was performed. But if he hold out a woman to the world as his wife, she ought to be considered and treated as such; and I cannot assent to the doctrine that he would not be liable to an action for goods furnished to her during cohabitation, she living in the same house with him, and being allowed to use his name; for it would be manifest injustice to allow him to turn round in a Court of Justice and say that she was not his wife. But the ground on which I think I improperly rejected the witness at the trial, was, that, in modern times, the rules of evidence have been too much narrowed. They ought to be directed rather to the credit than to the competency of a witness. This appears to me to be the safe course; and the Courts have hitherto been too jealous, and have acted on too refined a principle, in excluding testimony, often shutting out facts which ought to be let in. Mr. *Phillips*, in his *Treatise on Evidence* (*a*), drew the same conclusion from the decision of Lord *Kenyon* in the case referred to in *Campbell* v. *Twemlow*, as I did at the trial, *viz.* that where a man has represented a woman as his wife, and treated her as such, she cannot afterwards be called as a witness, for the purpose of shewing that she was not married to him. But the true principle appears to me to be laid down by Mr. *Starkie*, in his *Treatise on Evidence* (*b*). The mere fact of a woman living with a man in the same house, is not of

(*a*) Vol. 2, 82. (*b*) Vol. 2, 711.

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itself a ground to exclude her testimony altogether; and more particularly so, as, where they are not legally married, the situation of the female may be changed in an instant, and the terms on which she resides with the person who protects her, may be put an end to at his will and pleasure. She is, therefore, in a situation wholly different from that of a wife, from whom a husband cannot be separated, and whose interests continue the same during their joint lives. It is far better that the objection should go to the credit than to the competency of a female in the situation of this woman; and it is the province of a Jury to decide on the weight due to her testimony. Although neither of the learned writers to whom I have just referred, can be considered as an authority; still they tend to shew what has been the understanding of *Westminster Hall* on this subject. The principle laid down by Mr. *Starkie* appears to me to be the true one, and on it I shall act hereafter. The rule for a new trial must be made—

Absolute.

Tuesday, May 6th.

The grantor of an annuity having become bankrupt before the passing of the 6 *Geo.* 4, c. 16, the grantee sued the surety for arrears subsequently accruing, after that statute came into operation:—*Held*, that he could maintain the action until after proof of the annuity under the commission, in pursuance of ss. 54 and 55.

BELL and Another *v.* BILTON.

THIS was an action of covenant by the grantees of an annuity, against the surety of the grantor, and brought to recover the sum of 35*l.*, for two quarters of the annuity due on the 29th *October*, 1826. The plaintiffs declared, that, by an indenture of the 29th *January*, 1822, in consideration of the sum of 420*l.* advanced by the plaintiffs to one *Edmund Saffery*, he had contracted and agreed to grant to them an annuity of 70*l.* a-year for his life; and that the defendant, at the request of *Saffery*, had agreed to become his guarantee or surety for the due payment of the annuity during the life of *Saffery*; and assigned for breach non-payment of the above sum of 35*l.*, being two quarters' arrear of the annuity. The defendant

pleaded, *first, non est factum; secondly*, that, after the making of the indenture, and before the commencement of this suit, to wit, on the 15th *July*, 1823, the said *Edmund Saffery* was a tanner, and that, in the exercise of such trade, he was indebted to one *Henry Saffery* in the sum of 150*l.*; that, on the said 15th *July*, a commission of bankrupt was sued out against the said *Edmund Saffery*; and that, on the 24th, he was duly declared a bankrupt; that, on the 26th, notice of the bankruptcy was given in the Gazette; that the commission was prosecuted and proceeded in, and was in force after the making of the statute 6 *Geo.* 4, and after such statute took effect; and that, under and by virtue of that act, it became, and was, and is, lawful for the plaintiffs to prove, and they might and ought to have proved, and still ought to prove, and may prove, under the commission against the said *Edmund Saffery*, for the value of the said annuity, and for the payment thereof: but that the plaintiffs had omitted, neglected, and refused so to do. The defendant then averred, that he entered into and executed the said supposed indenture only as the collateral security for the payment of the said annuity, and that the money in the declaration alleged to be in arrear for and on account of the annuity, accrued due after the issuing of the commission, and after the plaintiffs might and ought to have proved under the same. *Thirdly*, that after the granting of the annuity by the said *Edmund Saffery* to the plaintiffs, as in the declaration mentioned, he became a bankrupt; that a commission was issued against him on the 15th *July*, 1823; and that thereupon, and by virtue of the statute 6 *Geo.* 4, the plaintiffs could, before the commencement of this suit, and should have proved under the commission against the said *Edmund Saffery*, for the value of the annuity, and for the payment thereof; that the plaintiffs did not nor would, nor had they as yet proved under the said commission, for the value or payment of the annuity, or otherwise in respect thereof; that

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the defendant was only collateral surety for the payment of the annuity, and executed the indenture only as such, and that he had well and truly paid all and every the several sums of money, which had hitherto from time to time accrued due from the said *Edmund Saffery* to the plaintiffs, by virtue of the annuity, except the said sum of 35*l.* in the declaration mentioned, which sum, and every part thereof, became due and in arrear, upon and by virtue of the annuity, since the bankruptcy of *Saffery*, and since the issuing of the commission against him.

The plaintiffs joined issue on the *first* plea of *non est factum;* and, as to the *second*, alleged, that they ought not to be barred from maintaining their action against the defendant, because, though true it was, that a commission of bankrupt issued against the said *Edmund Saffery*, and that he was thereupon declared a bankrupt, as in that plea alleged:—for replication, nevertheless, in that behalf, the plaintiffs said, that *Saffery* was declared a bankrupt, under the commission, on the 24th *July*, 1823, and that he passed his last examination under it, long before the passing of the statute 6 *Geo.* 4, to wit, on the 6th *September*, 1823, and that no meeting had been held under the commission since the passing of the said act, and after it took effect; and, further, that it did not become, nor was it lawful for the plaintiffs, neither might nor ought they to have proved, nor still ought they to prove, neither may they prove, under the said commission, for the value of the annuity, and for payment thereof, as the defendant had in his said plea in that behalf alleged. There was a similar replication to the last plea.

Rejoinder, to the replication to the *second* plea, after protesting its insufficiency, that, before and at the time of the commencement of this suit, it became and was lawful for the plaintiffs, and they could, and might, and ought to have proved, and still ought and may prove, under the said commission, for the value and payment of the annuity; and,

to the replication to the last plea, that the commission had been in force continually from the time of issuing the same hitherto, and that it was lawful for the plaintiffs to prove, and that they might and ought to have proved, under it, for the value and payment of the annuity, by virtue of the statute 6 *Geo.* 4, c. 16:—on which issues were joined.

At the trial, before Lord Chief Justice *Best*, at *Westminster*, at the Sittings after *Trinity* Term, 1827, the execution of the annuity-deed was admitted, as also that the defendant was the surety; and it appeared that *Saffery*, the grantor, had passed his last examination under the commission, on the 6th *September*, 1823, since which time, no meeting had been held, nor had any dividend been made, the grantor's estate being not more than sufficient to pay the expense of the commission. It was objected for the defendant, that this action could not be maintained, as, previously to its commencement, the plaintiffs ought to have called on the commissioners to ascertain the value of the annuity, as prescribed by the statute, 6 *Geo.* 4, c. 16, s. 54 (*a*), and that they were further bound to come in and prove the annuity under the commission, by virtue of the 55th section of the act (*b*).

(*a*) By which it is enacted,—"That any annuity-creditor of any bankrupt, by whatever assurance the same be secured, and whether there were or not any arrears of such annuity due at the bankruptcy, shall be entitled to prove for the value of such annuity, which value the commissioners shall ascertain, regard being had to the original price given for the said annuity, deducting therefrom such diminution in the value thereof, as shall have been caused by the lapse of time since the grant thereof to the date of the commission."

(*b*) By which it is enacted,—"That it shall not be lawful for any person entitled to any annuity granted by any bankrupt, to sue any person who may be collateral surety for the payment of such annuity, until such annuitant shall have proved under the commission against such bankrupt for the value of such annuity, and for the payment thereof; and if such surety, after such proof, pay the amount proved as aforesaid, he shall be thereby discharged from all claims in respect of such annuity; and if such surety shall not (before any

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His Lordship was inclined to think that the statute did not apply to commissions sued out before the statute 6 *Geo.* 4, was passed; a verdict was, therefore, taken for the plaintiffs for 35*l.*, the arrears of the annuity, leave being reserved to the defendant to move that the verdict might be set aside, and a nonsuit entered, in case the Court should be of opinion that the value of the annuity should have been ascertained by the commissioners, and proved under the commission.

Mr. Serjeant *Cross*, in the last *Michaelmas* Term, accordingly obtained a rule *nisi*, and submitted, that, as all the former statutes relating to bankrupts were repealed by the 6 *Geo.* 4, c. 16, that statute must necessarily apply to all bankruptcies then pending, as well as to subsequent commissions; and to embrace all, whether they had been sued out before or after the passing of the act. By the 49 *Geo.* 3, c. 121, s. 16, the commissioners were directed to ascertain the value of the annuity, for which the creditor was entitled to prove; but, as no mode was pointed out by which such value should be ascertained, Lord *Eldon*, in *Ex parte Whitehead* (*a*), directed it to be done

payment of the said annuity subsequent to the bankrupcty shall have become due) pay the sum so proved as aforesaid, he may be sued for the accruing payments of such annuity, until such annuitant shall have paid or satisfied the amount so proved, with interest thereon at the rate of *four per cent. per annum*, from the time of notice of such proof, and of the amount thereof, being given to such surety; and, after such payment or satisfaction, such surety shall stand in the place of such annuitant, in respect of such proof as aforesaid, to the amount so paid or satisfied as aforesaid by such surety; and the certificate of the bankrupt shall be a discharge to him from all claims of such annuitant, or of such surety, in respect of such annuity: provided that such surety shall be entitled to credit in account with such annuitant, for any dividends received by such annuitant under the commission, before such surety shall have fully paid or satisfied the amount so proved as aforesaid."

(*a*) 1 Meriv. 10—127; *S. C.* 2 Rose, B. C. 358.

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with reference to the original price, deducting from it such diminution in the value as should have been caused by the lapse of time between the grant and the date of the commission; and the latter part of the 54th section of the 6 *Geo.* 4, is framed according to that direction. The plaintiffs, therefore, ought to have proved the value of this annuity under the 55th section of the 6 *Geo.* 4, which was the only act in force at the time of the commencement of the action.

Mr. Serjeant *Bosanquet*, in the course of the last Term, shewed cause, premising that the only question was, whether or not the provisions of the statute 6 *Geo.* 4, as far as respects the proof of annuities, applied to commissions sued out antecedently to the passing of that act. The mode adopted, as to the valuation of the annuity, by the 54th section, is entirely new, as regard is to be had to the original price given for the annuity, deducting therefrom such diminution in the value as shall have been caused by lapse of time since the grant to the *date of the commission.* The act must be construed beneficially for creditors; and, here, as no meeting has been held under the commission, since *September*, 1823, nor any dividends paid, if it were incumbent on the plaintiffs to cause the annuity to be valued before they commenced their action, they must have called a special meeting of the commissioners for that purpose, at their own expense. The 135th section of the statute enacts, that nothing therein contained shall alter the present practice in bankruptcy, except where any such alteration is expressly declared; and there is no declaration, either express or implied, as to any retrospective alteration in the practice of proving the value of annuities, which, antecedently to the statute, was to be ascertained by the commissioners according to its real value and the life of the annuitant; and the 136th section enacts, that the act shall not take effect before the 1st of *September*, 1825,

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at least, as far as regards the practice of proving annuities under commissions previously sued out.

Mr. Serjeant *Cross*, in support of his rule.—The practice in bankruptcy must be now regulated by the statute 6 *Geo.* 4, there being no other law applicable to it. The defendant is a mere surety for the payment of an annuity; and, until the security of his principal (the grantor) is exhausted, the surety ought not to be resorted to. The issue raised at the trial was a mixed question of law and fact, *viz.*, whether or not the plaintiffs could or ought to have ascertained the value of the annuity, and proved it under the commission. There was no obstacle in their way to prevent such proof; and although it has been said that the statute 6 *Geo.* 4 does not apply to pre-existing commissions, yet the 135th section defines the construction of the act to be, *inter alia*, that nothing therein contained should render invalid any commission then subsisting, or which should be subsisting at the time the act should take effect, or any proceedings which might have been had there-under, or affect or lessen any right, claim, demand, or remedy, which any person then had there-under, or upon or against any bankrupt against whom any commission had or should have issued, except as therein is specifically enacted. This clause, therefore, as far as it relates to existing commissions, has the effect of re-enacting the law as it stood under the old statutes, now repealed, except as therein specifically enacted; and the present case comes within the exception, and rests on the enactment contained in the 55th section, which stands alone, and does not depend on any prior or subsequent clause, in regard either to the persons to be affected, or the relief to be afforded by it. The intention of the Legislature was, to relieve sureties, as well prior as subsequent to the act. Although it has been said, that the act must be construed beneficially for creditors, still, as it was the only

law in force at the time the plaintiffs commenced the present action, they should have acted in conformity to it. This case, therefore, falls expressly within the words and meaning of the 55th section, which is not confined to commissions to be sued out thereafter; and, as the plaintiffs sued as annuity-creditors, and the defendant was a mere surety, he cannot be liable in this action, the plaintiffs not having previously caused the value of the annuity to be ascertained by the commissioners, or proved the same under the commission.

Cur. adv. vult.

Lord Chief Justice BEST now delivered the judgment of the Court as follows:—

This was an action of covenant brought against the surety of the grantor of an annuity, the grantor having become bankrupt. The annuity secured by the deed on which the action was brought, was 70*l. per annum.* The plaintiffs sought to recover 35*l.*, being for two quarters of the annuity, which became due on the 29th *October*, 1826. The annuity-deed was of the date of the 29th of *January*, 1822. The commission of bankrupt under which the grantor of the annuity was declared a bankrupt, issued in the year 1823. The bankrupt passed his last examination on the 6th of *September*, 1823. Since that time, no meeting has been held under the commission. No dividend has been paid. The plaintiffs might have had a meeting of the commissioners called for the purpose of ascertaining the value of the annuity, and of proving under the commission for its value so ascertained; but they must have been at all the expense occasioned by the calling of such meeting. The value of the annuity at the time of the issuing the commission, had not been ascertained by the commissioners, or proved by the plaintiffs under the commission. It was objected at the trial, that, although at the time the annuity was granted, there was no law that compelled the grantee to ascertain the value of his annuity at the date of the commission, and to

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prove for such value before he brought any action against the surety of the grantor, yet that, as the arrears sought to be recovered became due since the 6 *Geo.* 4, no action could be brought to recover them until after a valuation of the annuity and proof of the ascertained value under the commission, and delay on the part of the surety in paying the sum so proved. I confess I have had considerable difficulty in making up my mind as to whether or not the Legislature could mean to affect annuities granted before the passing of the late act; but, although I cannot satisfy myself that the principle of the act is just, I think, on reflection, that the Legislature did intend that the clause should apply to annuities granted before the passing of the 6 *Geo.* 4; and, being satisfied of that, we are bound to give it this effect, whatever may be the consequence. In the first place, the object of the Legislature was, completely to relieve bankrupts from all future demands on account of annuities granted by them. To do this, the act must be made to embrace such as were granted before, as well as those granted since it was passed. Again, where the Legislature intended that the statute should not affect commissions previously issued, that intention is declared in express terms. Such terms will be found in the 57th, 96th, and 98th sections. The introduction of such words into those sections furnishes a strong argument to prove that the other sections, containing words capable of bearing a retrospective construction, should receive that construction. The plaintiffs not having pursued the course pointed out by the statute 6 *Geo.* 4, the Court think that this action cannot be maintained, and therefore the rule for a nonsuit must be made—

Absolute.

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Tuesday, May 6th.

LANGLEY and Another *v.* BROWN.

The plaintiffs sent goods packed in a box, by the defendant's waggon. The box was placed, with its lid outwards, at the tail of the waggon, which was left during several hours in the night standing in the road opposite an inn, where the waggoner stopped, without any person to watch it. The box was forced open, and its contents abstracted. A notice was proved limiting the carrier's responsibility to 5*l.*:—*Held*, that the carrier was guilty of gross negligence in leaving the waggon so exposed, and, consequently, liable for the loss.

THIS was an action on the case. The declaration stated, that the defendant was a common carrier of goods for hire, from the *White Hart* Inn, *St. John's Street, Smithfield*, to *Bedford;* that the plaintiffs caused to be delivered to him, as such carrier, and that he accepted and received from them, a box containing goods to the value of 500*l.*, to be safely and securely carried by the defendant from the *White Hart* Inn to *Bedford*, and there to be safely delivered for the plaintiffs, for a certain reasonable reward to the defendant in that behalf; and assigned for breach, that, through the carelessness, negligence, and default of the defendant and servants by him employed, the box became and was wholly lost to the plaintiffs. Plea—Not Guilty.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after *Trinity* Term, 1827, it appeared that the plaintiffs were milliners at *Bedford;* that, on the 1st *November*, 1826, goods, consisting of millinery and furs, were packed in two boxes, nailed and corded in the usual manner, directed to them there, and were on that day taken by the porter of a wholesale dealer in *Friday Street*, to the *White Hart* Inn, *St. John's Street*, to be forwarded according to the direction; that the book-keeper received the boxes, took 4*d.* for the booking, and gave the usual receipt for the same in the porter's book; and that one of the boxes, containing furs of the value of 55*l.*, arrived safe, and was delivered to the plaintiffs, at *Bedford;* but that the other, containing millinery of the value of 300*l.*, had been broken open, and all its contents, with the exception of a few articles of the value of 3*l.*, taken out.

For the defendants, evidence was given of a notice, which was painted in large letters on a board in the yard of the *White Hart* Inn, stating that the carriers from that inn would not answer for any package beyond 5*l.*, unless insur-

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ance money was paid thereon. It was proved that, on the 4th *November*, 1826, the box in question was placed on the bows at the tail of the waggon, with the lid outwards; that the waggon left the *White Hart* between two and three o'clock in the afternoon of that day, and arrived at the *Bell* Inn, *Bell Bar*, sixteen miles from *London*, between ten and eleven o'clock at night; that the inn was on the right-hand side of the high road, and that there was no yard into which the waggon could be drawn; that it was therefore left on the side of the road, opposite to the inn, and that the horses were unharnessed and taken into the stables; that the waggon remained in the road till between five and six on the following morning, when the waggoner came into the inn, and said that the waggon had been robbed; and, on examination, it was found that the cords of the tarpaulin which was thrown over and covered the whole lading, as well as of the box in question, had been cut, the lid opened, and the contents stolen therefrom, without removing the box. It was also proved, that, shortly previous to the robbery, the defendant's waggon had had a watchman constantly employed to protect it at the inn, to whom he had given 1*s.* 6*d.* each time the waggon remained there, but which he had discontinued; and that there was another inn nearly opposite, where the waggon might have been put under shelter. It also appeared that three nails, driven into the cover of the box, had not taken hold, as the lid projected beyond its side. Under these circumstances, his Lordship left it to the Jury to say, whether the waggon had been properly watched; and observed, that, although the defendant might seek to protect himself under the notice, yet that it would not avail him, if he had been guilty of gross negligence. The Jury were of opinion that he had, and accordingly found a verdict for the plaintiff for the value of the goods lost.

Mr. Serjeant *Wilde*, in the last *Michaelmas* Term, ob-

tained a rule *nisi* that this verdict might be set aside, and a new trial granted, on the ground that there was no evidence that the defendant had been guilty of *gross* negligence. He submitted that the loss could only be attributable to the improper mode in which the box was nailed; and that, if it had been properly secured, its contents could not have been taken out without forcing the lid; whereas, it appeared that only the cord was cut, when the goods would, of course, fall out.

Mr. Serjeant *Taddy* was now about to shew cause, when the Court called on—

Mr. Serjeant *Wilde* to support his rule.—The loss of the goods contained in the box can only be attributed to the improper manner in which it was corded or fastened. The box was not removed from that part of the waggon in which it had been placed. It was stowed with all necessary care, being covered with a tarpaulin, which was sufficient to protect it. In *Jones on Bailments*, the different degrees of neglect, as applicable to this question, are thus defined (*a*):—"*Ordinary* neglect, is the omission of that care which every man of common prudence, and capable of governing a family, takes of his own concerns. *Gross* negligence, is the want of that care which every man of common sense, how inattentive soever, takes of his own property. *Slight* neglect, is the omission of that diligence which very circumspect and thoughtful persons use in securing their own goods and chattels." This, therefore, was, at most, only a case of ordinary or slight neglect; and there is a wide distinction between extreme care and gross negligence. In the one, the eye of the party should never be averted from the article entrusted to him; whilst, in the other, there must be the total want of that care which the most inat-

(*a*) Page 118.

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tentive person might take of his own property. The merely not watching a waggon during the whole period it remains at the door of an inn, cannot be said to amount to *gross* negligence. The goods might have been stolen, although the waggoner might have left the waggon but for a minute. Besides, regard must be had to the nature of the property, as well as the mode in which it is packed: and here the box in question could only, from its appearance, be supposed to contain goods of trifling value, as it was merely corded, and the lid not properly fastened or nailed down.

Lord Chief Justice BEST.—I am clearly of opinion, that, under the circumstances of this case, the defendant was guilty of *gross* negligence. I fully agree with the definitions given by Sir *William Jones*, in his valuable Essay on the *Law of Bailments*, one of which is, that "*gross* neglect is the want of that care which every man of common sense, how inattentive soever, takes of his own property." Here, it appears that the waggon arrived at an inn on the road to *Bedford*, sixteen miles from *London*, between the hours of ten and eleven o'clock at night, and that there was no regular watchman there. It was the duty of the defendant to afford a certain degree of security to property entrusted to his care, according to its extent and value; and it is for a Judge to say what the law will consider *gross* negligence to be, and for a Jury to determine, from the facts before them, whether a party has been guilty of such negligence or not; and it was so left to them in this case. The waggon ought to have been driven into the inn-yard or some secure place, or the waggoner ought to have stopped at another house, where it might have been taken care of. The negligence too was the more unpardonable, as it was proved that, previously to the loss of the box, there had been a watchman employed, but that his services had been discontinued. I am, therefore, clearly

of opinion that the Jury were fully warranted in finding the verdict they did.

Mr. Justice PARK.—I also think that the Jury were well warranted in arriving at the conclusion they did. They had all the evidence before them. The strongest point against the defendant appears to me to be, that the watchman who used to attend the waggon, had been dismissed a short time previously to the loss; and the defendant's waggoner allowed the waggon to be left at the door of an inn at the road side, at the distance of sixteen miles from *London*, without any one to protect it, although it was laden with valuable property. Besides, the box in question was improperly placed at the tail of the waggon, with the lid outwards. Its contents might have dropped out without any external violence being used. At all events, if the waggon had been properly watched, the loss could not have happened. I am therefore of opinion that the defendant is liable, notwithstanding the notice at the inn yard from which the waggon set out.

Mr. Justice BURROUGH.—The Jury had sufficient facts before them from which to infer that the defendant had been guilty of gross negligence. The waggon might have been guarded by a dog. It certainly ought not to have been left unprotected in a high road so near to *London*, when there was another house in the neighbourhood to which the waggoner might have gone.

Mr. Justice GASELEE.—There being another house in the same neighbourhood, where the waggon might have been properly taken care of, appears to me to be of itself conclusive against the defendant.

Rule discharged.

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Wednesday, May 7th.

ALLISON *v.* HAYDON.

A member of the *Royal College of Surgeons* cannot sue for medicines furnished, unless he be also certificated by the *Apothecaries' Company.*

Semble, that a surgeon may recover for such medicine as is necessarily administered in a *surgical* case.

THIS was an action of *assumpsit*, for work and labour as a surgeon and apothecary, brought by the plaintiff, to recover from the defendant the amount of certain charges for medicines furnished to, and attendance on, the defendant's son, whilst labouring under an attack of *typhus fever.*

At the trial, before Mr. Justice *Burrough*, at the adjourned Sittings at *Westminster*, after the last *Michaelmas* Term, it appeared that the plaintiff was a member of, and had a certificate from, the *Royal College* of *Surgeons;* but that he had no certificate to practise as an *apothecary*, from the Master and Wardens of the *Apothecaries' Company*, as required by the statute 55 *Geo.* 3, c. 194; nor had he practised as an *apothecary* prior to the month of *August*, 1815. Upon this, it was objected, for the defendant, that the 21st section of the act (*a*) precluded the plaintiff from his right to recover.

The learned Judge was of opinion, that the objection was well founded, and directed a nonsuit, reserving leave to the plaintiff to move to set it aside.

Mr. Serjeant *Taddy* accordingly, in the last Term, obtained a rule *nisi*, and that a verdict might be entered for the plaintiff. He contended that the plaintiff, having obtained his certificate from the *Royal College of Surgeons*, was, at all events, entitled to charge for medical attendance, &c. without having a certificate from the *Apothecaries' Com-*

(*a*) By which it is enacted— "that no apothecary shall be allowed to recover any charges claimed by him, in any Court of law, unless such apothecary shall prove, on the trial, that he was in practice as an apothecary prior to, or on the 1st *August*, 1815, or that he has obtained a certificate to practise as an apothecary, from the Master, Wardens, and Society of Apothecaries."

pany. The 20th section of the statute enacts, that, if any person (except such as were then actually practising as such) should, after the passing of the statute, act or practise as an apothecary, without having obtained his certificate, every person so offending shall, for every such offence, forfeit and pay the sum of 20*l*. And the 21st section requires the certificate to be produced at the trial. But neither of those clauses affects the plaintiff, as he falls expressly within the exception in the general saving clause, section 29 (*a*).

Mr. Serjeant *E. Lawes* now shewed cause, relying on the 21st section of the act, which he submitted was conclusive against the plaintiff, and perfectly untouched by the general saving in the 29th section. A patient, labouring under a typhus fever, cannot be considered as the subject of a surgical case, or as requiring the skill or attendance of a surgeon; nor is it usual for a member of that branch of the profession to administer medicines, his province being more particularly confined to the setting of fractured limbs, and to the cure of such disorders, hurts, or ailments, as require external applications, or the operations of the knife.

(*a*) By which it is enacted—"That nothing in this act contained shall extend or be construed to extend to lessen, prejudice, or defeat, or in any wise to interfere with, any of the rights, authorities, privileges, and immunities heretofore vested in, and exercised and enjoyed by, either of the two *Universities of Oxford* or *Cambridge*, the *Royal College of Physicians*, the *Royal College of Surgeons*, or the said *Society of Apothecaries*, respectively, other than and except such as shall or may have been altered, varied, or amended, in and by this act, or of any person or persons practising as an apothecary previously to the 1st day of *August*, 1815; but the said *Universities*, *Royal Colleges*, and the said *Society*, and all such persons or person shall have, use, exercise, and enjoy all such rights, authorities, privileges, and immunities, save and except as aforesaid, in as full, ample, and beneficial a manner, to all intents, and purposes, as they might have done before the passing of this act, and in case the same had never been passed."

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Mr. Serjeant *Taddy*, in support of the rule.—The *College of Surgeons* is specially exempted from the operation of the statute, by the 29th section, and the plaintiff was a Member of that College. The object of the Legislature in passing the act, was, that the public should be protected from the injurious consequences that must necessarily result from the profession of physic being open to vulgar and illiterate persons; and that none should be allowed to practise medicine but those who should be found duly qualified. The vending and dispensing of drugs form the proper and immediate business of the chemist and druggist, and of the apothecary. The surgeon moves in a higher grade in the profession. The object of the Legislature evidently was, that the latter should be subject only to the control of the *Royal College*, and the former to that of the *Apothecaries' Company*. It never has been deemed requisite for a surgeon, who, in the course of his practice, must necessarily furnish medicines to the patients he visits, to be armed with a certificate from the *Apothecaries' Company*, while possessing the higher qualifications and immunities of the College; and it has ever been the practice of surgeons to dispense every description of medicine requisite for the cases on which they may be called in. Here, too, the charges were made for attendances or visits, to which a surgeon is entitled, although an apothecary is not. A surgeon necessarily prescribes for his patients; and he may supply medicines in cases where such supply is incident to a surgical operation.

Lord Chief Justice BEST.—I should be extremely sorry to lay down any rule calculated to affect or operate injuriously on any branch of the medical profession. The members of each are most valuable to the community, and have done honour to their country, by their learning and science. The act in question establishes a most useful law, and was intended not only to regulate the practice

of apothecaries, but to make them more respectable; and the primary object of the Legislature, was, to exclude low and illiterate persons, and to prevent all those from practising as apothecaries, who had not undergone a regular course of study to qualify them so to do. The 21st section expressly enacts, that "no apothecary shall be allowed to recover *any charges* claimed by him, in a Court of Law, unless he shall prove on the trial that he was in practice as an apothecary prior to or on the first of *August*, 1815; or that he has obtained a certificate to practise as an apothecary, from the Master, Wardens, and Society of Apothecaries." Here, the plaintiff had no such certificate, nor had he practised as an apothecary previously to 1815; and yet he administered medicine, and was in attendance on a patient labouring under a typhus fever, the first stage of which requires the advice of a physician, and the attention and attendance of an apothecary. It has been said, however, that the plaintiff falls within the exception in the 29th section of the statute, by which it is provided, that nothing in the act contained shall extend to lessen, prejudice, or interfere with, the rights and privileges of the *Royal College of Surgeons;* and that the plaintiff having obtained a certificate from, and being a member of, that *College*, he must be considered as of a class in the profession superior to an apothecary, and entitled to practise physic as well as surgery. But I am of opinion that he cannot do so. The *Royal College of Physicians* is also excepted from the operation of the act; but, if a physician were to degrade himself by preparing or dispensing his own medicines, he would not be within the protection of the act, nor could he recover for such medicines, although furnished to his own patients. The statute does not confer any new privileges on the *College of Surgeons*, but only preserves the old. In the infancy of medical science, surgeons were mere operators; and, by the statute *32 Hen.* 8, c. *42*,

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the barbers and surgeons of *London* were incorporated together, and made one company; but when the two corporations were made separate and distinct, by the statute 18 *Geo. 2*, c. 15, by which Examiners were appointed to examine and admit surgeons, &c., the latter became a more honourable profession, and moved in a higher grade. The province of a surgeon has properly been said to be confined to the reduction and cure of fractures and other injuries affecting the limbs, or such external ailments as may require the operation of the knife; and it cannot be extended to internal complaints or local diseases. Whatever medicine may be necessary for the purpose of removing a complaint which it is the duty of a surgeon to attend to and cure, he might perhaps be allowed to recover for; but he is not entitled to recover, unless the medicine he administers be clearly ancillary to his duty as a surgeon. The Legislature has marked the distinctions between the various departments of the medical profession. A chemist may prepare, compound, dispense, and vend, drugs and medicines, and medicinal compounds (*a*), but he cannot attend patients or administer medicine. Each branch of the profession was, therefore, meant to be protected; and the members of one cannot transgress the limits of the particular avocation he follows, or interfere with the province of the others. I am of opinion, that the plaintiff in this case has interfered with the province or practice of the apothecary, and, therefore, that he had no right to recover.

Mr. Justice PARK.—The object of the Legislature in passing the statute *55 Geo. 3*, was, to keep the business of an apothecary distinct from the other branches of the profession. The title professes it to be, "An act for better regulating the practice of apothecaries through-

(*a*) See 55 Geo. 3, c. 194, s. 28.

out *England* and *Wales*;" and the 14th section, in order to prevent persons from practising as apothecaries who are not properly qualified, enacts,—" that, from and after the passing of the act, it shall not be lawful for any person (except persons already in practice) to practise as an apothecary, unless he shall have been examined by the Court of Examiners, or the major part of them, and have received a certificate of his being duly qualified to practise as such, from the said Court of Examiners, who are thereby authorized and required to examine all persons applying to them, for the purpose of ascertaining the skill and abilities of such persons in the science and practice of medicine, and their fitness and qualification to practise as apothecaries." A person, therefore, cannot obtain a certificate to authorize him to practise as an apothecary, unless, upon examination, he be found to possess sufficient skill and ability in the science of medicine, to qualify him to do so. The 15th section also requires applicants for an examination for a certificate to practise, to produce to the Examiners testimonials of a sufficient medical education. With respect to the 29th, or general saving clause, the privileges of the *College of Physicians* are preserved, as well as those of the *Royal College of Surgeons*. The 28th section points out the mode by which chemists and druggists are to exercise their trade or business, in the preparing and vending of drugs; and, although they may give advice, yet it must be gratuitous, for they can only recover for the value of the medicines sold. Here, the plaintiff, being only qualified to act as a surgeon, has acted in the character of an apothecary, and he cannot be entitled to recover for attendances as such, or for medicines administered to a patient, unless in a case falling expressly within his own department as a surgeon.

Mr. Justice BURROUGH.—At the trial, I was at first in-

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clined to think that the plaintiff was entitled to recover; but, when I looked at the statute, I entertained no doubt, as the 21st section expressly prohibits an apothecary from recovering *any charges*, unless he prove that he has obtained his certificate.

Mr. Justice GASELEE.—The 20th section of the statute draws a distinction between persons practising as apothecaries without obtaining their certificates, and persons who act as assistants to apothecaries, to compound and dispense medicines. Therefore, no person can act even as an assistant to an apothecary, without having first passed his examination before the Court of Examiners. I believe, that, in the Navy, where a party acts in the double capacity of surgeon and apothecary, he must pass an examination, both at the *College* and at the *Hall*, and obtain certificates at each.

Rule discharged.

Tuesday, May 6th,

An affidavit to hold to bail, stating, that the defendant was indebted to the plaintiff in 20*l.*, lent and advanced on a bill of exchange for 37*l.*, drawn by *J. S.* on and accepted by the defendant, and now over-due and unpaid,—is sufficient.

BENNETT *v.* DAWSON.

THE defendant was arrested on the following affidavit of debt:—"*J. F.* of &c., maketh oath and saith that *James Dawson* (the defendant) is justly and truly indebted to *Thomas Bennett* (the plaintiff) in the sum of 20*l.* lent and advanced on a certain bill of exchange for 37*l.*, bearing date the 6th *February*, 1828, drawn by one *J. Henry John Stracey*, on and accepted by the defendant, and now over-due and unpaid."

Mr. Serjeant *Lawes*, on a former day in this Term, obtained a rule *nisi*, that the bail-bond given in this cause by the defendant, might be delivered up to be cancelled, on a common appearance being entered, on the ground that the above affidavit was defective, in not stating that the money

was lent *to* the defendant, and in what character the plaintiff claimed.

Mr. Serjeant *Wilde* now shewed cause, and relied on the case of *Bradshaw* v. *Saddington* (*a*), where an affidavit, stating that the defendant was indebted to the plaintiff in 100*l.*, upon and by virtue of a certain bill of exchange drawn by the defendant, and long since due and unpaid, was held sufficient; the Court saying,—"that it sufficiently indicated the ground on which the plaintiff had held the defendant to bail; that it was upon a bill of exchange, drawn by the defendant, on which he was justly indebted to the plaintiff; that it was not necessary for the latter to specify in what particular character, whether as payee or indorsee, he claimed: and that, if he had no interest in the bill on which he could sue the defendant, he would be guilty of perjury, and would be liable to an action for maliciously holding the defendant to bail." This case is far stronger, as it is here sworn that the defendant is indebted to the plaintiff in a certain sum lent on a bill drawn on and accepted by the defendant, and over-due and unpaid.

Mr. Serjeant *Lawes*, in support of his rule. The affidavit is clearly insufficient, as it does not state that a debt was due to the plaintiff by virtue of the bill of exchange, nor does it appear by or to whom the money was advanced. It might not have been lent to the defendant, but to the drawer of the bill. The plaintiff should have shewn positively that it was lent *by* him, and advanced *to* the defendant. In *Fenton* v. *Ellis* (*b*), an affidavit, stating that the defendant was indebted to the plaintiff, for goods sold and appraised to the defendant, not adding, by the plaintiff, was held bad; and *Eyre* v. *Hulton* (*c*), and *Taylor* v. *Forbes* (*d*),

(*a*) 7 East, 94.

(*b*) 6 Taunt. 192; *S. C.* 1 Marsh. 535.

(*c*) 5 Taunt. 704; *S. C.* 1 Marsh. 315.

(*d*) 11 East, 315.

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were there referred to, and recognised and adopted by the Court. In *Humphries* v. *Winslow* (*a*), an affidavit, stating the defendant to be indebted to the plaintiff as indorsee of a bill drawn by a third party, was held insufficient, as it did not shew in what relation the defendant stood to the bill; and in *Machu* v. *Fraser* (*b*), the defendant was arrested on an affidavit, stating that he was indebted to the plaintiff on a bill of exchange drawn by the plaintiff upon and accepted by the defendant; and Lord Chief Justice *Gibbs* there said: "Every word of this may be true, and yet the plaintiff may not be entitled to arrest the defendant; and if so, certainly it is not such an affidavit as can support this arrest." So, here, the plaintiff did not shew that he had any interest in the bill, either by indorsement or otherwise; nor did he state in what character he sought to recover, nor that the sum lent on the bill was advanced by him to the defendant; and, for any thing that appeared, the bill might still be in the possession of the drawer.

Lord Chief Justice BEST.—The numerous cases on this point are of a most conflicting nature, and we must, therefore, have recourse to common sense. The true principle was laid down in *Bradshaw* v. *Saddington, viz.* that if the plaintiff had no interest in the bill on which he could sue the defendant, he would be guilty of perjury; and enough appears on the face of this affidavit to support an indictment for perjury, if the plaintiff has not a sufficient interest in the bill to entitle him to sue the defendant.

Mr. Justice PARK.—The Courts have required great nicety in framing affidavits to hold to bail. They must be direct and positive that the plaintiff has a subsisting cause of action, as well as certain and explicit as to the nature of

(*a*) 6 Taunt. 531; *S. C.* nomine *Humphries* v. *Williams*, 2 Marsh. 231.

(*b*) 7 Taunt. 171; *S. C.* 2 Marsh. 483.

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the cause of action; but I have always understood an affidavit to hold to bail on a bill of exchange, to be sufficient, although it do not state in what character the plaintiff sues, *viz.* whether as payee or indorsee; and here, the plaintiff has sworn that the defendant is indebted to him in the sum of 20*l.* lent on a bill of exchange, accepted by the defendant, which is over-due and unpaid. That appears to me to be sufficient.

Mr. Justice BURROUGH and Mr. Justice GASELEE concurring—

Rule discharged without costs.

LEDBETTER, Assignee of HOLLIS, a Bankrupt, *v.* SALT.

Thursday, May 8th.

If a petitioning creditor make an affidavit of debt, on which a commission is sued out, stating that the party against whom the commission is to be issued, is indebted to him in the sum required by the statute, and that such party has become bankrupt, he cannot afterwards, in an action brought against him by the assignees under a second commission (the former having been superseded), dispute the validity of the commission founded on his affidavit; and, in such case, the writ of *supersedeas* is sufficient evidence of the issuing of the first commission.

THIS was an action of trover, brought by the plaintiff, assignee of *Hollis*, a bankrupt, to recover from the defendant a quantity of flour, which was alleged to have been fraudulently obtained by him from the bankrupt, and converted to his own use.

At the trial, before Lord Chief Justice *Best*, at the last Summer Assizes, at *Winchester*, it appeared, that, on the 8th *June*, 1825, the defendant, in order to obtain a commission of bankrupt against *Hollis*, made the following affidavit of debt:—"*Joseph Salt*, of &c., maketh oath and saith, that *James Hollis*, of &c., miller, dealer, and chapman, is justly and truly indebted to this deponent in the sum of 100*l.* and upwards, for goods sold, and that the said *James Hollis* is become a bankrupt within the true intent and meaning of the statutes made and now in force concerning bankrupts; and that the commission, when obtained, is intended to be executed at *Southampton*."

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A commission was accordingly issued on this affidavit, on the 14th *June;* and, a short time afterwards, *Hollis* entered into a composition with the defendant, on his agreeing to take flour from the bankrupt worth 108*l.*, which was sufficient to satisfy his debt; and having obtained it on the 8th *July*, he proceeded no further with the commission, which was on the 22d superseded. A second commission was sued out against *Hollis*, on the 23d *July*, at the suit of *Turner*, another creditor, on the ground of an act of bankruptcy committed by *Hollis*, by a fraudulent transfer or delivery of the flour to the defendant, in order to give him a preference over the rest of his creditors. The plaintiff was appointed assignee under the second commission, on the 29th *July*, and accordingly commenced the present action against the defendant, to recover the value of the flour. Notice having been given by the defendant of his intention to dispute the act of bankruptcy by *Hollis*, under the former commission, the plaintiff gave in evidence the writ of *supersedeas*, and the affidavit of the defendant on which such commission was sued out, and proved that the flour was delivered to the defendant clandestinely; when it was objected that this was insufficient, as it was necessary for the plaintiff to prove the proceedings under the former commission, which, being the best evidence, it was insisted, ought to have been produced. His Lordship, however, was of opinion that the defendant was estopped, by his own affidavit, from disputing the bankruptcy under the commission sued out by him, as he had therein positively sworn that *Hollis* had become bankrupt, and the commission was founded on that affidavit. A verdict was accordingly taken for the plaintiff for the value of the flour, leave being reserved to the defendant to move to set it aside, and that a nonsuit might be entered, in case the Court should be of opinion that the objection was well founded.

Mr. Serjeant *E. Lawes*, in the last *Michaelmas* Term, accordingly obtained a rule *nisi*, and submitted that the only question was, as to the construction to be put on the statute 5 *Geo. 2*, c. 30, s. 24 (*a*), which enacts, that if a bankrupt, after the issuing of a commission against him, give and deliver to the person who sued out the same, goods or any other satisfaction for his debt, whereby such person shall receive more in the pound in respect of his debt than the other creditors, such delivery shall be deemed an act of bankruptcy; and here, the plaintiff gave no evidence that any such commission had been sued out. The writ of *supersedeas* merely recited that a commission had issued, and that alone was not sufficient evidence. The commission itself ought to have been produced.

Mr. Serjeant *Wilde* now shewed cause.—The case of

(*a*) By which,—after reciting that commissions of bankrupts are frequently taken out by persons, who, by means of such commissions (on a composition proposed by the bankrupts), and on promise not to execute the same, prevail with and extort from the bankrupts their whole debts, or much greater part thereof than such bankrupts pay to their creditors; or otherwise get from such bankrupts, goods, or other real or personal security, which is contrary to the true intent and meaning of the several statutes made concerning bankrupts, which said statutes intend, that all such bankrupts' creditors shall be on an equal foot, and not one preferred before another, or paid more than another in respect of his or her debt,—it is enacted,—"that, if any bankrupt shall, after issuing of any commission against him, pay to the person or persons who sued out the same, or otherwise give or deliver to such person or persons, goods, or any other satisfaction or security for his debt, whereby such person or persons suing out such commission shall *privately* have and receive more in the pound in respect of his debt than the other creditors, such payment of money, delivery of goods, or giving greater or other security or satisfaction, shall be deemed and taken to be such an act of bankruptcy, whereby, on good proof thereof, such commission shall and may be superseded; and it shall be lawful for the Lord Chancellor to award to any creditor or creditors petitioning, another commission."

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Gervis v. *The Grand Western Canal Company* (*a*), is decisive to shew, that a writ of *supersedeas*, reciting that a commission had issued on a day certain, is evidence that such a commission actually issued on that day; and in *Harmer* v. *Davis* (*b*), it was held, that a petitioning creditor cannot dispute the validity of a commission sued out by himself; for, as Lord Chief Justice *Gibbs* said, "The petitioning creditor is compelled by statute to make oath that the bankrupt is indebted to him to the amount of 100*l.*; and, therefore, it is not open to him to controvert the commission;" and Mr. Justice *Park* said: "A petitioning creditor, having sworn to the amount of his debt, cannot contend that the bankrupt, after having committed an act of bankruptcy, is not liable to him to that amount." Here, the defendant positively swore that *Hollis* had become bankrupt; and it was, therefore, unnecessary for the plaintiff to prove the act of bankruptcy committed by him. Besides, the statute 5 *Geo.* 4, c. 98, was in force at the time of the commencement of this action; the 8th section of which enacts, that, if a trader liable to become bankrupt, shall, after *a docket struck* against him, pay to the person who struck the same, money, or give or deliver to any such person any satisfaction or security for his debt, whereby such person may receive more in the pound in respect of his debt than the other creditors, it shall be an act of bankruptcy.

The Court here called on—

Mr. Serjeant *E. Lawes*, to support his rule.—In *Ex parte Browne*, Lord *Eldon* said (*c*): "I have no right to consider a docket struck as the issuing of a commission." So in *Ex parte Paxton*, his Lordship said (*d*): "Experience in the

(*a*) 5 Mau. & Selw. 76.
(*b*) 1 B. Moore, 300; *S. C.* 7 Taunt. 577.
(*c*) 15 Ves. 474.
(*d*) Id. 462.

business of bankruptcy proves, that the affidavit made upon striking a docket is rather too rashly sworn in many cases; but I have not, in this case, the doubt that I have expressed in others, whether the act of striking a docket alone would bring the party within the statute 5 *Geo.* 2, c. 30, s. 24." It was incumbent on the plaintiff, in this case, to produce the commission. The affidavit of the defendant did not prove that the commission had been sued out; but merely that *Hollis* had become bankrupt, from which it must be inferred, that a commission *might or was about to be* issued; and in *Wydown's* case, Lord *Eldon* said (*a*): " It is impossible to bring the mere act of receiving a debt after a docket struck, within the words of the act of Parliament." Although the *supersedeas* might be sufficient evidence to shew that the commission had issued, yet it did not prove that *Hollis* was a bankrupt when he agreed to deliver the flour to the defendant; and the petitioning creditor's debt, on which the former commission was founded, might, for any thing that appeared to the contrary, have been discharged previously to such delivery. It was, therefore, incumbent on the plaintiff to shew that the commission had, in point of fact, been sued out at the instance of the defendant; and the affidavit and *supersedeas* were not sufficient evidence for that purpose.

Lord Chief Justice BEST.—I should have had no doubt, if this question had stood only on the statute 5 *Geo.* 2, c. 30, s. 24; but the language of the statute 5 *Geo.* 4, c. 98, s. 8, is somewhat different; and, if effect be given to it, is decisive against the objection raised for the defendant. What are the facts? In *June*, 1825, the defendant sued out a commission of bankrupt against *Hollis*, and, in order to obtain it, he made an affidavit of debt, which was not in the usual form, *viz.* ' that *Hollis* was become

(*a*) 14 Ves. 85.

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a bankrupt *as the deponent had been informed and believed;*' but, *positively*, 'that *Hollis* was indebted to him in 100*l.*, for goods sold, and that he was become bankrupt within the true intent and meaning of the statutes.' After the commission was sued out, *viz.* in *July* following, the defendant, in a clandestine manner, obtained from the bankrupt goods, for the recovery of which the present action was brought. He then proceeded no further in his commission, and it was afterwards superseded. Another commission was subsequently sued out against *Hollis*, at the instance of other of his creditors, on the ground of a fraudulent delivery of the goods in question to the defendant, by which he committed an act of bankruptcy. At the trial, the *supersedeas* of the former commission was put in, and there can be no doubt but that it was of itself sufficient evidence that such commission had been sued out; for, in *Gervis* v. *The Western Canal Company*, it was held, that a writ of *supersedeas*, reciting that a commission issued on a certain day, was evidence to shew that such commission actually issued on that day. The question then is, whether, the defendant having treated *Hollis* as a bankrupt, and positively sworn to that fact, it was incumbent on the plaintiff to prove the trading, act of bankruptcy, and petitioning creditor's debt, under the former commission. I thought not, as the defendant was estopped from disputing these matters by the terms of his own affidavit. But, as it was said at the trial, that Lord *Eldon* had expressed considerable doubts in *Wydown's* case, in *Ex parte Paxton*, and *Ex parte Browne*, as to whether the mere striking of a docket could be considered as the issuing of a commission within the 24th section of the statute 5 *Geo.* 2, c. 30, I thought it fit to pause before I decided the point; and consequently reserved it for the consideration of the Court. But, if those cases be looked at, it will be found that his Lordship was not called upon to decide that question. In *Wydown's* case, he said, it was not necessary for him to ex-

press any opinion upon it. In *Ex parte Paxton*, he said, that he had not the doubt he had expressed in other cases, as that was the case of securities obtained by the creditor after, not merely a docket struck, but a commission actually issued; and in *Browne's* case, he said, that it did not appear whether a docket was actually struck when the security was obtained; and all he decided was, that security or satisfaction taken after a docket struck, not followed by a commission, though it could not be retained, and might amount to a contempt, was not within the statute 5 *Geo.* 2, c. 30; and he there observed: "The Legislature understood that the person striking a docket was to proceed to take out the commission forthwith; the construction of the act was, that no other creditor could take out a commission; and then in this jurisdiction was interposed the rule, that the docket should not avail, unless followed by a commission in a given time." Here, however, the *supersedeas* was sufficient evidence that the commission had been issued; but, independently of that, I am of opinion, that all doubts on this point are removed by the case of *Harmer* v. *Davis*, where the very question came under the consideration of this Court. There, it was held that a petitioning creditor cannot dispute the validity of a commission of bankrupt sued out by himself, although, in an action brought against him by the assignees to recover the money of the bankrupt, it appear, that, on the balance of accounts, the bankrupt was not indebted to the petitioning creditor in a sum sufficient to support the commission; and the opinions of Lord Chief Justice *Gibbs*, and my brother *Park*, are decisive to shew that a petitioning creditor, having sworn to the amount of his debt, cannot dispute the validity of a commission afterwards sued out and founded on such affidavit. In *Ex parte Paxton*, Lord *Eldon* said (*a*): "I agree, the man must be a bankrupt within the meaning of the 24th section of

(*a*) 15 Ves. 463.

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5 *Geo.* 2, c. 30; but the language, '*after issuing* of any commission against him,' shews an adjudged bankrupt was not intended; but that he might be a bankrupt, within the meaning of this clause, before any commission established against him. The statute not merely prohibiting the transaction, but making it an act of bankruptcy, proceeds upon this reason, that, if the creditor who has taken out a commission stops before the bankruptcy is declared, though the proof that an act of bankruptcy was committed may be in his power, it may not be within the reach of any other creditor; therefore that act is made itself an act of bankruptcy, upon which, without further proof, another commission may be taken out. It is not, however, necessary to decide upon the argument, whether this clause of the statute means a person actually a bankrupt, or so treated by those who take out the commission; as, upon the evidence, the bankruptcy is established clearly, and without contradiction." The object of the statute 5 *Geo.* 2, c. 30, was, to prevent a party against whom a commission had been sued out, from afterwards compounding with him at whose suit it was issued. Here it is sufficient to say, that the defendant treated *Hollis* as a bankrupt, in his affidavit on which the first commission was obtained; and he cannot now turn round and say that he was not a bankrupt. As, however, the 24th section of 5 *Geo.* 2, c. 30, was obscurely penned, and did not fully reach the evil it was intended to repress, the 8th section of 5 *Geo.* 4, c. 98, which was in force at the time of the commencement of this suit, enacted, that, if any trader, liable by virtue of the act to become bankrupt, should, after a *docket struck* against him, compound with the party who struck it, it should be an act of bankruptcy. A party, therefore, *liable* to become bankrupt, falls within the operation of that clause. But, independently of that, I rely on the authority of *Harmer* v. *Davis*. That case does not interfere

with the doubts expressed by Lord *Eldon*, which were not particularly called for in the cases before him.

Mr. Justice PARK.—The only question is, whether a petitioning creditor, who sets the law in motion, is not afterwards estopped from disputing a commission of bankrupt to which he gave birth by his own immediate act. However invalid or ineffectual such commission might be in regard to others, still *he* cannot dispute it. The case of *Harmer* v. *Davis* was tried before me at *Gloucester*, and I reserved two points for the consideration of the Court; one of which was, whether, the defendant being the petitioning creditor, in an action brought against him by the assignees of the bankrupt, there was sufficient evidence of a debt to support the commission, it having been reduced, according to an account stated between him and the bankrupt, to below 100*l.*; and the Court were all of opinion, that a petitioning creditor, having sworn to the amount of his debt, could not afterwards dispute any stage of the bankruptcy, or contend that the bankrupt was not indebted to him in that amount. Here, the defendant not only swore that *Hollis* was indebted to him in the sum of 100*l.*, but that he *had become bankrupt:* and it was not competent to him afterwards to controvert that affidavit, which he had made according to the directions of the statute. The doubts entertained by Lord *Eldon*, as to whether the striking a docket might be considered as the issuing of a commission, do not trench on the authority or impeach the decision of the Court in *Harmer* v. *Davis*, which appears to me to be precisely in point, and conclusive of the question.

Mr. Justice BURROUGH.—I am of the same opinion.

Mr. Justice GASELEE.—The argument for the defend-

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ant is founded on a misapprehension of the use to which his affidavit, on issuing the first commission, was to be applied. It has been said, that it was not sufficient to establish the fact that *Hollis* had been guilty of an act of bankruptcy. But the affidavit was put in for the purpose of shewing that the first commission was sued out at the instance of the defendant; and that was not the only evidence; for the writ of *supersedeas*, which recited the commission, proved that it had issued, and was evidence of the day it bore date. It was clearly shewn that *Hollis* had committed an act of bankruptcy within the statute 5 *Geo.* 2, c. 30, by privately causing the goods, to recover the value of which this action was brought, to be delivered to the defendant after a commission had been sued out by him, whereby he might obtain an undue preference over the rest of the creditors. But all doubt on this question appears to me to be completely removed by the case of *Harmer* v. *Davis*, which establishes the principle, that, if a petitioning creditor make an affidavit of debt, on which a commission is sued out, stating that a party is indebted to him in the sum required by the statute, and that he has become bankrupt, he cannot afterwards gainsay it; and more particularly so, where the commission is afterwards proceeded with, and eventually superseded by the act of the party at whose instance it was sued out. It must also be considered, that the defendant alone put the bankrupt in the situation to commit the offence imputed to him, and which was clearly proved at the trial. The 8th section of the 5 *Geo.* 4, c. 98, makes a material alteration. It differs most essentially from the 5 *Geo.* 2, c. 30, as far as regards a case of this description, and is adopted in terms in the 6 *Geo.* 4, c. 16, the 8th section of which enacts, that, if a trader pay to the person *striking the docket* money, or deliver satisfaction or security for his debt, whereby such person may receive more in the pound than the other creditors, such payment shall be an act of bank-

ruptcy; and the word *privately* is omitted in both the latter statutes. This rule, therefore, must be—

Discharged.

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BIRD, an infant, by BIRD, his next friend *v.* HOLBROOK.

Thursday, May 8th.

THIS was an action on the case brought by the plaintiff against the defendant, to recover compensation in damages for an injury inflicted on the former by the discharge of a spring-gun set in the defendant's ground. The *first* count of the declaration alleged, that the defendant had placed in a certain garden of the defendant, a certain instrument called a spring-gun, loaded with gun-powder and shot, with certain wires communicating with the lock of the said gun, by the treading upon which the gun could and might be let off; by means whereof the persons against whom the same should be discharged, might and could be much hurt, maimed, and wounded: and thereupon, it became the duty of the defendant, after he had so placed the said gun, not to suffer it to remain so loaded, without giving notice or warning, to prevent persons having occasion to enter into the said garden from treading upon the wire, in ignorance that the same was so set, and thereby letting off the gun, and being injured by the discharge thereof. Yet the defendant, not regarding his duty in that behalf, wrongfully, wilfully, and negligently, suffered the gun to remain in his garden so loaded and set, without giving any such notice or warning whatever; by means whereof the plaintiff, having occasion to enter into the garden, and not having any notice, warning, or knowledge, or any means of knowledge, that any spring-gun was set in the garden, trod upon the wire attached to the lock of the gun; by means whereof it was let off and discharged, and the shot discharged therefrom were driven against the plaintiff, and

The defendant set a spring-gun in his garden, (which was at some distance from his dwelling), of which fact he gave no notice. The plaintiff entered the garden in pursuit of a strayed fowl, and, coming in contact with one of the wires, was wounded by the discharge of the gun:—*Held*, that the plaintiff was entitled to recover damages for the injury, in an action on the case.

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one of his legs was maimed; and the plaintiff was otherwise injured, and became disordered, and so continued for a long time: by means whereof he suffered great pain, and expended a large sum of money in his cure.

The *second* count alleged, that it was the duty of the defendant not to allow the spring-gun to remain loaded in the day-time, without notice to prevent persons from treading upon the wire, from ignorance that it was set.

The *third* count described the spring-gun as a certain dangerous engine, made for the purpose, and with the intent, to lacerate, maim, and wound persons; and alleged that it was the duty of the defendant not to suffer the spring-gun to remain in the garden, without using due and proper and reasonable means or care to prevent such persons as might enter into or be in the garden, from ignorantly and unwittingly treading on the wire communicating with the lock of the gun; and that the defendant did not take due and proper and reasonable care to prevent persons who might enter into or be in the garden, from ignorantly and unwittingly treading upon the wire of the gun, and thereby causing it to be let off; but that the defendant neglected and wholly refused so to do, and, on the contrary, contriving and intending to injure the plaintiff, wrongfully and injuriously permitted the gun to remain in his garden, so loaded, and set with the wire, by means of which it might be let off and discharged, without any notice or warning: by means whereof, the plaintiff, not being able to perceive a certain concealed wire, and not having any notice or knowledge, or means of notice or knowledge thereof, trod upon the said last-mentioned wire, and the gun was thereby let off.

The *fourth* count charged the defendant with having set, upon certain other ground of the defendant, a spring-gun, made with intent to lacerate, maim, and wound persons, being then and there loaded with gun-powder and shot, and set with concealed wires: and that thereupon it

became the duty of the defendant not to permit the gun to remain on the ground without taking due, proper, and reasonable means and care to prevent any person from ignorantly and unwittingly treading upon the wire, and causing it to be let off.

The *fifth* count charged, that the wires were concealed and imperceptible; that the defendant had taken no means or precaution whatsoever to prevent persons from treading on them through ignorance that they were so set; and that the defendant wrongfully permitted the plaintiff, in entering into and proceeding in the said last-mentioned ground, to tread upon the said wire, so concealed and imperceptible and unknown to the plaintiff.

The *sixth* count charged the defendant with setting a gun upon certain other land of the defendant, and alleged the breach of duty, in having taken no means or precaution whatever to prevent persons from treading on the wire, and having wrongfully and injuriously permitted the plaintiff, in entering into and proceeding in the said last-mentioned garden, to tread upon the wire.

At the trial, before the Lord Chief Justice, at the *Bristol* Assizes, in the year 1825, a verdict was taken for the plaintiff, by consent, damages 50*l.*, subject to a case reserved, with liberty to either party to turn it into a special verdict. The facts of the case were as follows:—

"Before and at the time of the plaintiff's sustaining the injury complained of, the defendant rented and occupied a walled garden, in the parish of *St. Philip & St. James*, in the county of *Gloucester*, in which he grew valuable flower-roots, and particularly tulips of the choicest and most expensive description.

"The garden was at the distance of nearly a mile from the defendant's dwelling-house, and above one hundred yards from the road, and was in a place called the 'Nursery.' In it there was a summer-house, consisting of a

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single room, in which the defendant and his wife, some considerable time before, had slept, and intended in a few days after the accident again to have slept, for the greater protection of their property. The garden, which was rectangular, was surrounded with a wall, by which it was separated, on the south, from a foot-way up to some houses; on the east and west from other gardens; and, on the north, from a field which had no path through it, and was itself fenced against the highway, at a considerable distance from the garden, by a wall.

"On the north side of the garden, the wall adjoining the field was seven or eight feet high: the other walls were somewhat lower. The garden was entered by a door in the wall. The defendant had been, shortly before the accident, robbed of flowers and roots, from his garden, to the value of 20*l.* and upwards; in consequence of which, for the protection of his property, with the assistance of another man, he placed in the garden a spring-gun, the wires connected with which were made to pass from the door-way of the summer-house to some tulip-beds, at the height of about fifteen inches from the ground, and across three or four of the garden paths; which wires were visible from all parts of the garden wall; but it was admitted by the defendant, that the plaintiff had not seen them, and that he had no notice of the spring-gun and the wires being there; and that the plaintiff had gone into the garden for an innocent purpose, to get out a pea-fowl that had strayed.

"A witness, to whom the defendant mentioned the fact of his having been robbed, and of his having set a spring-gun, proved that he had asked the defendant if he had put up a notice of such gun being set; to which the defendant answered, that 'he did not conceive that there was any law to oblige him to do so.' And the defendant desired such person not to mention to any one that the gun was set, 'least the villain should not be detected.'

The defendant stated to the same person, that the garden was very secure, and that he and his wife were going to sleep in the summer-house in a few days. No notice was given of the spring-gun being placed in the garden; and, before the accident in question occurred, another person, to whom the defendant mentioned the fact of his garden having been robbed of roots to the value of 20*l.*, and to whom he stated his intention of setting a spring-gun, proved, that he had told the defendant that he considered it proper that a board should be put up, but that he could not give an opinion as to the law; and the witness did not recollect what the defendant had said in answer.

"On the 21st *March*, between the hours of six and seven in the afternoon, it being then light, a pea-hen belonging to a Mr. *Morgan*, who occupied a house in the neighbourhood, had escaped, and, after flying across the field above-mentioned, alighted in the defendant's garden. A female servant of the owner of the bird, was in pursuit of it, and the plaintiff, a boy of the age of nineteen years, seeing her in distress from the fear of losing the bird, said he would go after it for her. He accordingly got upon the wall at the back of the garden, next to the field, and, having called out two or three times, to ascertain whether any person was in the garden, and waiting a short space of time without receiving any answer, jumped down into the garden. The bird took shelter near the summer-house; and the boy's foot coming in contact with one of the wires, close to the spot where the gun was set, it was thereby discharged, and a great part of its contents, consisting of large swan shot, was lodged in and about his knee-joint, and caused a severe wound."

The question for the opinion of the Court was, whether the plaintiff was entitled to recover: if so, the verdict to stand; otherwise, a nonsuit to be entered.

Mr. Serjeant *Wilde*.—The plaintiff is entitled to re-

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cover, as well on the facts stated in the case, as on the general principles of law. No individual has a right to protect his property by administering punishment by way of example. The infliction of punishment is for the law. If the object of a party, in placing a spring-gun, be not the prevention of a trespass or felony, but the punishment of an offence when committed, it is an illegal act. No person can intentionally produce an injury to another in his absence, which, if present, he could not be justified in doing; and if a man place a dangerous machine or instrument for the purpose of protecting his property, knowing how it will operate in his absence, he is equally answerable for a consequent injury as though he were present, and was the directing or moving agent. No one, even to prevent a felony, can inflict a greater injury than is necessary for the purpose of apprehending the offender, in order that he may be prosecuted according to law; and extreme violence cannot be resorted to in the first instance. A mere trespasser cannot be apprehended; at all events, he cannot be exposed to the infliction of wounds which may produce death; and an individual, by withholding his presence, cannot increase the danger of the party trespassing. The facts of this case distinguish it altogether from those of *Deane* v. *Clayton* (*a*), and *Ilott* v. *Wilkes* (*b*). Lord Chief Justice *Dallas*, in *Deane* v. *Clayton*, said (*c*): "One other point only remains, before I come to the question itself, which is, how far the present decision will apply to measures that may, by direct operation or necessary consequence, affect human life. As to this, I will only observe, such cases seem to me to depend on different grounds; the law distinguishing, to many and most essential purposes, between property and the life of man; and to the facts of this case only my present opinion is intended to apply:" and Mr.

(*a*) 2 Marsh. 577; *S. C.* 1 B. Moore, 203; 7 Taunt. 489.

(*b*) 3 Barn. & Ald. 304.

(*c*) 1 B. Moore, 230.

Justice *Burrough* said (*a*): "Intention to cause the injury is not the governing feature in cases of (what is ordinarily called) nuisance, although it may, in many cases of the kind, be an important fact. If the thing be done, and the injury to another's rights be the consequence, the law will, if necessary, supply the intention. But I conceive that express intention may make that act in some cases unlawful in the beginning." In *Ilott* v. *Wilkes*, Lord Chief Justice *Abbott* said (*b*): "We are not called upon in this case to decide the general question, whether a trespasser sustaining an injury from a *latent* engine of mischief, placed in a wood or grounds where he had no reason to apprehend personal danger, may or may not maintain an action." Here, the defendant did not place the gun to operate by way of terror or caution, but expressly to inflict an injury which it was not competent to him by law to inflict; and although his ultimate object might be to protect his property, yet he did all in his power to conceal the fact of the gun being set. His primary intent, however, was to injure, as he desired a person to whom he spoke of it, not to mention to any one that the gun was set, "least the villain should not be detected." His object, therefore, was, not only to detect, but to punish. Humanity requires that persons should be put on their guard; and notice should have been given that the gun was set in the garden, particularly as it was merely placed there to protect property, and not persons. The plaintiff had no reason to apprehend personal danger; nor was there an appearance of any thing calculated to arouse caution, or to create alarm. The gun offered no impediment or resistance to the commission of the trespass; and the plaintiff might have been in the act of retiring before it was discharged. In *Ilott* v. *Wilkes*, Mr. Justice *Holroyd* said (*c*): "If, indeed, a party who had no notice, had gone into the grounds, although he would be a trespasser, the act of firing

(*a*) 1 B. Moore, 211. (*b*) 3 Barn. & Ald. 308. (*c*) Id. 315.

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off the gun by treading accidentally on the wires, would not, in consequence of those wires being latent, be considered his own act; but he would be a mere instrument of producing that which resulted from a prior act done by another." Here, it is quite clear that the plaintiff was a mere trespasser. His intent in entering the garden was innocent; and, even had it been otherwise, he could at most only have been guilty of a misdemeanor, under the statute 43 *Eliz.* c. 7. Besides, the gun was set in the day-time; and a party cannot be justified in placing an instrument of death in his grounds, for the mere purpose of preventing a trespass on his property. If the defendant had been in the garden at the time the plaintiff entered, he would have been bound to caution him; and it therefore follows that, being absent, he should have given some notice that the gun was set. Lord Chief Justice *Best*, in *Ilott* v. *Wilkes*, said (*a*), "Humanity requires that the fullest notice possible should be given, and the law of *England* will not sanction what is inconsistent with humanity." Again, said his Lordship (*b*): "The prevention of intrusion upon property is a right essential to it; and every proprietor is allowed to use the force that is *absolutely* necessary to vindicate it. If he uses more force than is *absolutely* necessary, he renders himself responsible for all the consequences of the excess." Lord *Coke*, in his Second Institute (*c*), lays down a general principle, and takes a distinction between the defence of the person and the defence of property, thus: "There is also another diversity between an appeal of mayhem, or an action of trespass for wounding, or mannas of life and member; and an action of trespass of assault and battery for a man in defence, or for the preservation, of his possession of lands or goods; for, in that case, he may justify an assault and battery; but he cannot justify either mayheming, or

(*a*) 3 Barn. & Ald. 319. (*b*) Id. 317. (*c*) Page 316.

wounding, or mannas of life and member; and so note a diversity between the defence of his person and the defence of his possession or goods." In *East's Pleas of the Crown* (*a*), it is said, that, to justify homicide, or killing, "there must be a *felony* intended; for if one come to beat another, or to take his goods, merely as a trespasser; though the owner may justify the beating of him so far as to make him desist, yet, if he kill him, it is manslaughter: but, if the other had come to rob him, or take his goods as a felon, and were killed in the attempt, it would be justifiable in self-defence." "But (*b*), where the trespass is barely against the property of another, the law does not admit the force of the provocation sufficient to warrant the owner in making use of any deadly or dangerous weapon. As, if, upon sight of one breaking his hedges, the owner take up an hedge-stake, and knock him on the head and kill him, this would be murder; because it was an act of violence much beyond the proportion of provocation. And still more, where such or the like violence is used after the party has desisted from the trespass. But, if the beating were with an instrument or in a manner not likely to kill, it would only amount to manslaughter: and it is even lawful to exert such force against a trespasser, who comes without any colour to take the goods of another, as is necessary to make him desist;" and *Regina* v. *Mawgridge* (*c*) is refered to in support of that position. In *Hale's Pleas of the Crown* (*d*), it is laid down, that, "if *A.* comes into the wood of *B.*, and pulls his hedges or cuts his wood, and *B.* beats him, whereof he dies, this is manslaughter; because, though it was not lawful for *A.* to cut the wood, it was not lawful for *B.* to beat him, but, either to bring him to a Justice of Peace, or

(*a*) Vol. 1, p. 272.
(*b*) Id. 288.
(*c*) 1 Kelynge, 132.
(*d*) Vol. 1, 473.

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punish him otherwise according to law." Again (*a*), "now, concerning felonies, as there is a difference between them and trespasses, so there is a difference among themselves in relation to the point of *se defendendo*. If a man comes to take my goods as a trespasser, I may justify the beating of him in defence of my goods; but if I kill him, it is manslaughter; but if a man comes to rob me, or take my goods as a felon, and in my resistance of his attempt I kill him, it is *me defendendo* at least, and in some cases not so much." It therefore follows, and may be laid down as a general principle, that, where a party, as a trespasser, offers a degree of resistance in the first instance, a man may exercise a necessary degree of force in order to make him desist; but such force must be progressive, according to the conduct or obstinacy of the offender; and even if a party had been guilty of the highest offence that could have been committed, in a case of this nature, *viz.*, the stealing of roots in the garden, the defendant would not have been justified in using an instrument of death, even had he been present; and, as Lord Chief Justice *Dallas* said, in *Deane* v. *Clayton* (*b*), "that which it is unlawful to do by direct means, it is equally unlawful to do by indirect means." "Is it illegal," asked his Lordship, "to place spikes or glass upon a wall?—and, if a party climbing over be thereby wounded or cut, can he bring an action? And yet if I were to see a trespasser coming down my area, or getting over the garden wall, I could not drive the spike into his hand, or cut him with the glass." In such a case, spikes or glass would offer a resistance at the moment of entering, and might be seen. Here, however, the gun was not visible; and if the defendant had been in the garden, and had discharged it at the plaintiff and killed him, he would have been guilty of the crime of murder.

(*a*) Id. 486. (*b*) 1 B. Moore, 233.

The act of concealment was contrary to humanity, and to the common feelings of nature. A party trespassing, or even entering a garden with a felonious intent, should at all events have warning. There is a manifest distinction between the case of a spring-gun set for the protection of a man's house or person from nightly intruders, against whom he might be unable to offer any other effectual resistance; and that of one placed for the mere protection of property. A party must rely on the laws of his country for protection, and cannot be permitted to purchase his security by inflicting bodily injury on an imprudent or unwary transgressor or trespasser; nor can a man be allowed to do that which is inconsistent with humanity, or to do that indirectly which it is not lawful for him to do directly. On these grounds the plaintiff is entitled to judgment.

Mr. Serjeant *Merewether*, *contrà*.—It has been contended, that the plaintiff is entitled to recover on the facts stated in this case, as well as on general principles of law. Two propositions, however, may be deduced from the latter, which will constitute a good defence to this action; *first*, the defendant's right to adopt measures for the protection of his property during his absence; and *secondly*, that a wrong-doer cannot be entitled to recover compensation for any injury occasioned by his own unlawful act. Although it has been said, that a party is not justified in inflicting punishment on another, as that is the province of the law; and that a man cannot do that indirectly, which he is not justified in doing directly; yet, it is quite clear, that it is lawful to resist a trespass. The defendant did not intend to punish a party entering his garden; but to protect his property there by the detection of the offender. His object, therefore, was to prevent, rather than to punish. It has been assumed, in the argument for the plaintiff, that the defendant was a wrong-doer, as he

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had voluntarily absented himself from the garden after the gun was set; and that, if he had been present, he would not have been justified in discharging it at the plaintiff. The absence of the defendant might have been merely temporary, or in the course of his necessary avocations; and, as the garden was at the distance of nearly a mile from his house, he was justified in endeavouring to protect his property therein during such absence, by means which he would not have been warranted in resorting to had he been present. An inclosed or walled garden cannot be compared to a wood or open field; and, as the defendant's property in the garden had been previously plundered, he was induced to resort to means to protect it in future, by the detection of the party offending. In *Deane* v. *Clayton*, Lord Chief Justice *Gibbs* was clearly of opinion that a person had a right to protect his property against a trespasser or agressor, for he said (*a*): "As far at least as civil rights are concerned, every man may guard his own land from encroachments, by any means he pleases, provided he does not thereby invade or interfere with the legal rights of others. It is the *rights* of others, and not their security against the consequences of wrongs, that I am bound to regard." In *Ilott* v. *Wilkes*, Mr. Justice *Bayley* said (*b*): "It has been said that these guns were wrongfully and unlawfully placed in the wood. Now, let us enquire whether it was unlawful or not. One of the tests of trying that question is this,—does the law punish a man for the mere act of putting these instruments upon his own premises?—is he indictable for it?—for that is the criterion by which we are to judge of the legality of this act. If it cannot be shewn that it is an unlawful act to set these spring-guns, it seems to me that the defendant was at liberty to do it." Here, the plaintiff was clearly committing a trespass at the

(*a*) 1 B. Moore, 241. (*b*) 3 Barn. & Ald. 311.

time he received the injury. He was, therefore, a wrong-doer, and it is a well known maxim, that *commodum ex injuriâ suâ nemo habere debet* (*a*); so it is an established principle of law, that *jus ex injuriâ non oritur*. But it has been said, that, if the defendant had been present, he could not have used force without previous notice; that only necessary force can be used to prevent a trespass or repel a trespasser; and that, in the case of an illegal entry, the trespasser must be requested to depart before violence can be resorted to; and even then, that a wounding could not be justified. A distinction has been taken between a felony and a trespass. In the latter case, a party present, who sees an act of trespass committed on his property, may repress it and oppose the trespasser with force, provided he do not go beyond what the occasion requires, as he cannot take the law into his own hands. But here, the defendant's property was at a distance from his dwelling, and he had a right to secure it in his absence, against a party coming to invade it. Although it has been said, that humanity required some notice to be given that the gun was set, yet there is no decision which goes the length of shewing, that such notice is necessary. In *Ilott* v. *Wilkes*, the party trespassing knew that there were spring-guns in the wood; but that case did not decide that the defendant was bound to give notice, and Mr. Justice *Holroyd* there said (*b*): "A party who enters on a place as a trespasser, with full knowledge of the danger, is himself the cause of the mischief that ensues, and falls within the principle of law, *volenti non fit injuria*. If, indeed, the defendant had been present, and had seen a trespasser enter, and had the means of preventing the injury, and had not done all in his power to prevent it, unquestionably it might have been considered as proceeding from his own act; but, in the present case, he was absent, and

(*a*) Jenkins's Cent. 161. (*b*) 3 Barn. & Ald. 314, 316.

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had not the means of averting the mischief; and, therefore, the maxim of law, that a man cannot do that indirectly which he cannot do directly, is not applicable." Although it has been usual to give notice that spring-guns or man-traps are set in grounds, yet it is *ex majori cautelâ*. In *Brock* v. *Copeland* (*a*), the defendant, a carpenter, kept a dog for the protection of his yard, and for that purpose let it loose at night; and his foreman having gone into the yard after it was shut up for the night, was bitten; and Lord *Kenyon* said, "that every man had a right to keep a dog for the protection of his yard or house; that the dog had been properly let loose, and the injury had arisen from the plaintiff's own fault, in incautiously going into the defendant's yard after it had been shut up." There, the dog was not let loose for the purpose of protecting the yard from persons entering to commit felony, but from trespassers also. There, too, the party injured was not a trespasser, but the defendant's foreman; and yet, Lord *Kenyon* ruled that the action would not lie. If broken glass be placed on a wall, or spikes behind a carriage, for the protection of property, a party thereby receiving an injury, although by night, and in the absence of notice, could not recover compensation in damages for such injury, from the person who had caused the glass or spikes to be so placed. The plaintiff here has alleged, in the first count of his declaration, that it was the duty of the defendant to have given notice that the gun was set in the garden. It must be admitted, that, if it were uninclosed, or if persons were at liberty to resort to it for innocent purposes, it would have been incumbent on him to exercise an ordinary degree of caution; but, here, the garden was surrounded by a high wall, and the plaintiff must have used force in getting over it. The wall itself was sufficient to operate as a notice, and to render a person entering a wilful intruder; and it is found

(*a*) 1 Esp. Rep. 203.

as a fact in the case, that the wires communicating with the gun were visible from all parts of the garden-wall. That, therefore, was equivalent to actual notice. In *Ilott* v. *Wilkes*, the trespasser did not know the particular place in the wood where the guns were placed; and here the gun was only intended to operate during the night. Since the plaintiff sustained the injury, to recover compensation for which the present action is brought, the stat. 7 & 8 *Geo.* 4, c. 18, was passed, by which it is enacted, that, after its passing, persons setting spring-guns shall be guilty of a misdemeanor, except they be set for the protection of dwelling-houses, from sunset to sunrise. It must be, therefore, inferred, that the Legislature thought the setting such instruments to be legal before that statute was passed. In the case referred to by Lord *Kenyon*, in *Brock* v. *Copeland*, where a party kept a mischievous bull, there was a right of way over the close in which it was kept; and, therefore, it was held that such party was answerable for any injury a person passing through the close might sustain from it. The principle, *sic utere tuo ut alienum non lædas*, shews that a man is not to make any use of his property he pleases, but is so to use it as not thereby to injure or annoy another in the enjoyment of his *rights* or *property*. That, however, does not apply to the case of a wrong-doer, or a party exercising an unlawful or unjustifiable claim. The gun in this case was not set for the prevention of a mere ordinary trespass, as it required no mean effort to get over the wall. In *Blythe* v. *Topham* (*a*), the defendant dug pits on a common, and the plaintiff's mare straying thereon, fell into one of them and died; and it was held, that the action could not be supported, because it did not appear that the mare had any right to be on the common. That case is far stronger than the present, as there there was no notice, nor was there any wall round the pit into which the mare

(*a*) Cro. Jac. 158; *S. C.* 1 Bull. N. P. 78.

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fell, neither was it in inclosed ground, as in this case, to enter which must be considered as a wilful trespass. In *Deane* v. *Clayton*, Lord Chief Justice *Dallas* lays down the true distinction, as to the presence or absence of a party, in a case of this nature. "Presence," said his Lordship (*a*), "in its very nature, is more or less protection; absence is abandonment and dereliction for the time. Presence may supply means, and limit what it supplies; but if, during absence, property can only be protected by such means as may be resorted to in the case of presence, all property lying open to inroad can have no protection, at least by any act of the party himself; for, to say that he can only be protected, when absent, by such means as he could use if present, is a contradiction in the nature of things." On the grounds, therefore, that the defendant was not prohibited by law from setting the gun in his garden to protect his property therein during his absence, and as the plaintiff was clearly a trespasser, he cannot be entitled to recover in this action, the injury he sustained having arisen from his own unlawful act.

Mr. Serjeant *Wilde*, in reply.—Admitting that the defendant had a qualified right to set the gun in his garden, still he is liable in a civil action, for an injury sustained by one who had no previous notice that it was placed there. In *Ilott* v. *Wilkes*, Mr. Justice *Bayley* founded his opinion on the circumstance, that the plaintiff had notice that there were spring-guns in the wood; for, said his Lordship (*b*), "Although it may be lawful to put these instruments on a man's own ground, yet, as they are calculated to produce great bodily injury to innocent persons, for many trespassers are comparatively innocent (which is the case here), it is necessary to give as much notice to the public as you can, so as to put people on their guard against

(*a*) 1 B. Moore, 233. (*b*) 3 Barn. & Ald. 312.

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the danger. The case of a man keeping on his own premises a furious dog or bull, is to a certain degree analogous to this. Suppose such a person were to give a notice, that in his premises there is a furious bull, and that it is dangerous for any person to enter, and a wrong-doer, who had read this notice, enters, and the bull attacks him, it is clear that he could maintain no action for the consequences of his own act." And Mr. Justice *Holroyd* said (*a*): "The mere act of placing spring-guns in a man's own ground, is not of itself unlawful. It is not an indictable offence; nor will it subject a party to an action, unless some injurious consequence result from it. If any such consequences result, it may perhaps form the subject of an action:" and his Lordship afterwards founded his judgment on the fact, that the plaintiff had express notice that the guns were set in the wood. Although a party may not be liable to an indictment for setting spring-guns in his inclosed field, yet he is liable to an action at the suit of a person who receives an injury therefrom, provided he has given no notice that they were placed there. The maxim, *sic utere tuo ut alienum non lædas*, applies most forcibly to this case. A man may perhaps dig a pit on his own land and leave it unfenced, and if the cattle of another fall in, he may not be liable for the injury; yet he is not justified in secretly placing a deadly weapon on his land, to wound or kill a trespasser. The object of the defendant was, that the gun should do a serious mischief to a party entering his garden; and the moment the consequence followed, the injured person had a right of action. In *Brock* v. *Copeland*, the dog was let loose in a yard attached to the defendant's dwelling-house to protect the property from being feloniously taken. Although, however, the defendant may have had a right to set a spring-gun in his garden, yet he was not justified in sup-

(*a*) 3 Barn. & Ald. 314.

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pressing the notice of its being placed there; and he not only expressly withheld notice, but he assigned as a reason that he did so, 'least the villain should not be detected.' It is evident, therefore, that the gun was set, not for the purpose of preventing a trespass, but of inflicting an injury on the party trespassing.

Lord Chief Justice BEST.—I am of opinion, that this action is maintainable. If any thing which fell from me in *Ilott* v. *Wilkes* were at variance with my present opinion, I should not hesitate to retract it; but the ground on which the three other learned Judges of the Court of *King's Bench* proceeded in that case, appears to me to be decisive of the present. I put the question distinctly on the ground that the plaintiff had notice that the guns were set. On that ground only the Court held that the action was maintainable; and I said: "It cannot be unlawful to set spring-guns in an inclosed field, at a distance from any road, giving *such notice* that they are set, as to render it in the highest degree probable that all persons in the neighbourhood must know that they are so set." Lord Chief Justice *Abbott* there said (*a*): "I believe that many persons who cause engines of this description to be placed in their grounds, do not do so with the intention of injuring any one, but really believe that the *notices they give* of such engines being there will prevent any injury from occurring, and that no person, who sees the notice, will be weak and foolish enough to expose himself to the perilous consequences likely to ensue from his trespass. In this case, it is found by the Jury, that the plaintiff actually knew that spring-guns were set in this wood. Considering the present action merely on the ground of *notice*, and leaving untouched the general question as to the liability incurred by placing such engines

(*a*) 3 Barn. & Ald. 309.

as these, where *no notice* is brought home to the party injured, I am of opinion that this action cannot be maintained." And Mr. Justice *Bayley* said (*a*): "This is a case in which the plaintiff *had notice* that there were spring-guns in the wood. It is not necessary to give notice to the public that guns are placed in such particular spots in such particular fields; for that would deprive the property of the intended protection. It is sufficient for a party generally to say, 'There are spring-guns in this wood;' and if another then takes upon himself to go into the wood, knowing that he is in the hazard of meeting with the injury which the guns are calculated to produce, it seems to me that he does it at his peril, and must take the consequences of his own act. The maxim of law, *volenti non fit injuria*, applies; for he voluntarily exposes himself to the mischief which has happened. He is *told*, that, if he goes into the wood, he will run a particular risk, for that in those grounds there are spring-guns. The declaration assumes the law to be, not that the mere act of placing these guns in a man's own ground is illegal, and punishable by indictment, but that a party doing that act may be liable to an action, provided he does not take the due and proper means, by giving notice, to prevent the injury which those engines are calculated to produce." That appears to me to be decisive of the present case. The language of Mr. Justice *Holroyd* is still stronger. He said (*b*): "I am of opinion that this action is not maintainable, on the ground that the plaintiff *had notice* that the spring-guns were placed in the wood in question: The plaintiff entered the wood with *full notice* that those engines were placed there, and with the knowledge, therefore, that the danger was unavoidable. So far as he was concerned, the cause of the mischief could not be considered as latent; and the act of letting off the gun, which was the consequence of his treading on the

(*a*) 3 Barn. & Ald. 311. (*b*) Id. 314, 316.

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wire, must be considered wholly as his act, and not the act of the person who placed the gun there:" and I am reported to have said (*a*), "Humanity requires that *the fullest notice* possible should be given; and the law of *England* will not sanction what is inconsistent with humanity." It has been said, however, in the argument for the defendant, that the law does not compel a party to do many acts which humanity may require; but no person can do a thing which he is not sanctioned by law in doing; and if he do an illegal act by which an individual receives an injury, he is liable to make him a compensation in damages. There is a wide distinction between the omission and the commission of an act. If the law would not reach a party for the commission of an act which Christianity forbids, religion and morality, which have ever been considered its foundation, would no longer form part of our law. The weak are not to suffer by the oppression of the strong. The poor are protected and fed from the pockets of the rich; and although the laws for the relief and maintenance of the indigent and helpless are open to great abuses, still the principles on which they are founded must be approved of. They are calculated to afford permanent relief to a large body of the community, who must otherwise depend wholly on the precarious aid of charity for their support. I am of opinion, that, if a person set spring-guns in his grounds, without giving any notice, he is guilty of a most inhuman act, and that, if injurious consequences result, the injured party is entitled to redress by action. But there is another ground, on which I am clearly of opinion, that this action may be maintained. This is the strongest case that can possibly be put against the defendant. He did not set the gun with an intent to terrify or alarm; for, when he was asked if he had put up a notice, he answered, that he did not conceive that there was any law to

(*a*) 3 Barn. & Ald. 319.

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oblige him to do so, and desired that the fact of the gun being set might not be mentioned to any one, 'least the villain should not be detected.' He, therefore, intended that the gun should operate against whomsoever might chance to enter the garden, whether he were a mere trespasser, or a person entering with a felonious intent; and that, on its contents being discharged, he might be deprived of life or limb. A trap might have been placed, by which a trespasser might have been secured; but the defendant, in setting the gun, meditated the infliction of a serious mischief, which accordingly ensued; and, as he resorted to a degree of violence which he was not justified in using for the purpose of preventing a mere trespass, he must be held liable. I am clearly of opinion, that, on these principles, and more particularly on the latter ground, this action is maintainable. I was at first somewhat perplexed by the late act of Parliament. If it had been prohibitory only, there would have been great weight in the argument raised for the defendant; because a new prohibitory law is the strongest possible evidence to shew, that there was no previously existing law against the thing or act prohibited. But, on looking at the act, it will be found that it prohibits the setting of spring-guns, *either with or without notice;* and in the first section, it is enacted and *declared*, that, from and after the passing of the act, if any person shall set a spring-gun or other engine calculated to destroy human life, or inflict grievous bodily harm, he shall be guilty of a misdemeanor. The statute, therefore, is declaratory as well as prohibitory, enacting, that, although notices may be given, the parties shall still be liable to a misdemeanor; and virtually declaring that it was illegal to set spring-guns without notice before the act was passed: and the only exception from rendering a party liable to a prosecution for a misdemeanor is, in cases where spring-guns are set from sunset to sunrise for the protection of dwelling-houses, and

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gins or traps set with the intent of destroying vermin.—With respect to the case of *Brock* v. *Copeland*, Lord *Kenyon* there held, that every man has a right to keep a dog for the protection of his yard or house. But who was the party injured in that case? The foreman of the defendant, a carpenter, who let loose the dog in his own yard, which he had an unquestionable right to do; and if a trespasser had entered and had been bitten, he could have maintained no action. The foreman, from his being daily employed on the premises, knew that the dog was let loose at night; and, as Lord *Kenyon* justly observed, it was the plaintiff's own fault, in incautiously going into the defendant's yard after it had been shut up; but he might have gone there for a wrongful purpose, thinking, that, as the dog knew him, he would have been protected. With respect to the case of a ferocious bull, adverted to by Mr. Justice *Holroyd* in *Ilott* v. *Wilkes*, it is altogether distinguishable from the present; for, if a man cause such an animal to be placed in a field where there is a public footpath, he infringes on the rights of the public; and if any injury be done by the bull to a person passing through the field, the owner is liable to an action, and bound to compensate the party injured. It is not necessary now to decide whether the owner of such an animal would be liable, in case there were no footpath in the field. Although a man is not bound to destroy a vicious bull, yet he must keep him in a place where he is not likely to do mischief. The life of the animal is to be preserved, not for mischievous purposes, but for the renewal of his species. Here, however, the gun was set by the defendant with a wicked intent, and for the express purpose of doing mischief. With respect to the right of a party to place logs across a public path, or dig a ditch, as adverted to by Lord Chief Justice *Dallas*, in delivering his judgment in *Deane* v. *Clayton* (*a*), it must

(*a*) 1 B. Moore, 234.

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be observed, that his Lordship put it on these grounds, first, that the owner had a right to do what he pleased with his own land; and next, that the party sustaining the harm or damage had no right to be there. It is clear, that a party may drain his own land, and divide it as he thinks fit. For these purposes he may cut ditches and raise fences; and if a person fall into one of such ditches, he must take the consequences, as the owner had a right to dig it for the improvement of his land. In the case of *Deane* v. *Clayton*, I was one of the counsel for the plaintiff; and, although the Court were there equally divided in opinion, I am strongly inclined to follow the doctrine there held by my brother *Park* and my brother *Burrough*. That case, however, is also very distinguishable from the present. There the plaintiff's dog was originally hunting in a woodland where the plaintiff had a right to hunt and encourage the dog to find his game. The mischief was done to the dog in an adjoining woodland belonging to the defendant; and the only division between the two woodlands was a low bank or mound of earth, not being a sufficient fence to prevent dogs from passing from the one to the other. The manner in which the defendant, and the owner of the woodland where the plaintiff was sporting, occupied their respective properties, was evidence of a consent or understanding that the enjoyment should be mutual, and that the one might come and hunt in the wood of the other without being considered as a trespasser. And, as Mr. Justice *Park* there observed, "the animal only followed his natural bent, and he having roused a hare, and pursued her, the plaintiff endeavoured, as much as in him lay, to prevent the dog from pursuing the hare, but was unable to do so." The dog was impelled, by his natural instinct, to pursue a hare started on land where the plaintiff had a right to sport, and there was no sufficient or even reasonable boundary to stop the animal in its progress. That case, therefore, appears to me to be entirely out of the question;

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whilst that of *Ilott* v. *Wilkes* is an authority in point. But we do not require any authority; for I ground my opinion in this case on the broad principle, that it is an inhuman act to set a spring-gun *in secresy*, with intent to catch or detect a man by means which may wound and disable him, or perhaps even deprive him of life. That appears to me to be against all human laws; and the great objects of the law of this country are, to preserve morality, to enforce and inculcate the exercise of humanity, and to support and sustain religion. Under all the circumstances, therefore, I am of opinion, that the defendant in this case has been guilty of a criminal negligence, in not having given notice that the gun was set in his garden; and that his conduct was grossly and criminally inhuman, as, when warned of the danger that might accrue, he desired the party not to mention that the gun was set, 'least the villain should not be detected.'

Mr. Justice PARK.—I also think that this action may be maintained. I still adhere to the opinion I expressed in the case of *Deane* v. *Clayton*, and with which my brother *Burrough* concurred; but I shall at present confine myself to the facts before the Court. As to whether the recent statute be a prohibitory or a declaratory act, I abstain from giving any opinion, as we are not now called on to decide that point. It certainly is a new law, as it makes the setting of spring-guns criminal, whether they be set with or without notice, except for the protection of dwelling-houses; and then they may only be set from sunset to sunrise: so that, during some of the summer months, a party must rise from his bed, at two or three in the morning, to remove the wire from the lock. The ground on which I found my opinion, is, that the defendant omitted to give any notice, and expressed a desire to conceal what he had done. In *Ilott* v. *Wilkes*, the whole Court, in delivering their opinions, proceeded on the ground that the plaintiff had notice

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that guns were set in the wood. Lord Chief Justice *Abbott* commenced his judgment by saying: "We are not called upon, in this case, to decide the general question, whether a trespasser sustaining an injury from a latent engine of mischief placed in a wood or in grounds where he had no reason to apprehend personal danger, may or may not maintain an action;" and he concluded by saying—"Considering the present action merely on the ground of notice, and leaving untouched the general question as to the liability incurred by placing such engines as these, where no notice is brought home to the party injured, I am of opinion that this action cannot be maintained." Although in *Deane* v. *Clayton* there was a notice; yet the trespasser was a dog, so that the notice could not be applicable to him. It has been said, however, that the law does not require a notice to be given; but, in *Ilott* v. *Wilkes*, the Court of *King's Bench* thought a notice necessary; for Mr. Justice *Bayley* there said: "Although it may be lawful to put these instruments on a man's own ground; yet, as they are calculated to produce great bodily injury to innocent persons (for many trespassers are comparatively innocent), it is necessary to give as much notice to the public as you can, so as to put people on their guard against the danger:" and my Lord Chief Justice said, that humanity required that the *fullest notice* possible should be given. There is one case which is precisely in point, and which has not been adverted to, *viz.* that of *Jay* v. *Whitfield*, tried before the late Lord Chief Baron *Richards*, at *Westminster*, in 1817 (*a*). There, the plaintiff, a boy, having entered the defendant's premises for the purpose of cutting a stick, was shot by a spring-gun, for which injury he recovered 120*l.* damages, and no attempt was afterwards made to set aside that verdict.

Mr. Justice BURROUGH.—Where spring-guns, or other

(*a*) 3 Barn. & Ald. 308, n.

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instruments of a like nature, are set in gardens or inclosed grounds, a notice is necessary to be given, according to the common understanding of mankind. Formerly it was the practice for the crier to give public notice of the fact of guns being set, on the usual market-days, in the town adjacent to the place where they were set. But, admitting that the defendant had a right to set the gun in his garden, he ought to have acted with the greatest care and caution; and, although he might have placed it there for the purpose of protecting his property by night, he should have removed the wires from the trigger during the day. Thieves who break into premises with a felonious intent, generally select the night for that purpose. Here, the plaintiff was a mere trespasser in the day-time, and yet he was exposed to the same degree of danger as if he had entered the garden at midnight, and for the purpose of plunder. If the defendant had been present at the time the plaintiff entered the garden, he could not have taken him into custody, or detained him. His only remedy was by an action for the trespass. He merely entered in pursuit of a bird which had escaped, which was an innocent purpose. I still adhere to the opinion I expressed in *Deane* v. *Clayton*, *viz.* that a person cannot justify doing that *indirectly* which he would not have been warranted in doing *directly*. There the question was, whether it was lawful to set dog-spears in a wood, of which the defendant was the owner and occupier, and which adjoined a wood in the occupation of a Mr. *Townsend*, and was divided from it by a low bank or mound, and a shallow ditch, not being a sufficient fence to prevent dogs from passing from the one wood to the other. There were several public foot-paths through the defendant's wood, which were not fenced off; and, for the preservation of hares therein, and to destroy dogs and foxes that might come in pursuit of them, the defendant caused iron spikes, sharp at each end, to be driven into several trees; under which a hare might pass without injury, but

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a dog, in pursuing her, would be liable to be wounded or killed. The defendant had caused to be placed on the outside of the wood, notices that steel traps, &c., were set therein; and the plaintiff was sporting, with permission of Mr. *Townsend*, in his wood; when his dog, having started a hare, and pursued her into the defendant's wood, ran against one of the spears and was killed. I was of opinion that the defendant was not justified in setting the spears, as against the plaintiff who was lawfully sporting in the adjoining wood by the permission of the owner, there being no division between the two woods; and I assimilated it to a case of persons having common of vicinage. There, too, the plaintiff did all he could to prevent his dog from entering the defendant's wood. Here, however, the defendant not only gave no notice, and wilfully abstained from doing so, but used every endeavour to suppress the fact that the gun was set.

Mr. Justice GASELEE.—I am of opinion that this question is set at rest by the decision of the Court of *King's Bench*, in *Ilott* v. *Wilkes*.

Postea to the plaintiff.

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THIS was an action of covenant brought to recover two quarters of a year's rent reserved by an indenture of lease, and due to the plaintiffs as devisees of one *Charles Bartholomew*, deceased, one of the lessors in the lease named; and also to recover damages for non-repair of the premises demised, pursuant to the covenant in that behalf.

In *covenant*, the declaration stated, that one *C. B. was seised* of an undivided moiety of certain premises, and that by his will he devised them to the plaintiffs, and their heirs, and afterwards died *so seised*. It was urged in arrest of judgment, that the declaration did not contain any sufficient allegation of title in *C. B.*, the devisor, it being stated merely that he was *seised* generally:—*Held*, that the declaration was sufficient after verdict.

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The first count of the declaration stated—"That one *Charles Bartholomew*, theretofore, and before and at the time of the making of the indenture therein-after next mentioned, *was seised* of and in certain tenements, with the appurtenances, to wit, one undivided moiety or half part of the tenements therein-after next mentioned, with the appurtenances; and being so seised, theretofore, to wit, on the 24th *December*, 1784, by a certain indenture, made between the said *Charles Bartholomew* of the first part, one *Archdall Harris* of the second, one *Eleanor Harris* of the third, and one *John Paggett* of the fourth part, they, the said *Charles*, *Archdall*, and *Eleanor*, did demise, lease, and to farm let, unto the said *John Paggett*, certain tenements, with the appurtenances, particularly mentioned and described in the indenture, to hold the same, with the appurtenances, to *Paggett*, his executors, &c., for the term of forty-five years, at the yearly rent of 40*l.*, yielding and paying therefore, yearly and every year during the said term, unto the said *Charles Bartholomew*, his heirs or assigns, for and in respect of the said one moiety or half part of the aforesaid demised premises, the yearly rent or sum of 20*l.* [then followed a covenant by the said *John Paggett* with the said *Charles Bartholomew*, his heirs and assigns, to pay to the latter the yearly reserved rent of 20*l.*, for and in respect of the said moiety or half part of the said premises, during the said term of forty-five years by the indenture demised; and also a covenant by *Paggett* with the said *Charles*, *Archdall*, and *Eleanor*, their heirs and assigns, to keep the demised premises in repair during the term]: by virtue of which demise *Paggett*, afterwards, to wit, on &c. aforesaid, entered into and upon all and singular the said demised premises, and became and was possessed thereof for the said term so to him thereof granted." The plaintiffs then averred, "that, after the making of the indenture, and during the term thereby granted, to wit, on &c., all the estate, right, title,

interest, term of years yet to come and unexpired, property, profit, claim, and demand whatsoever, of him, *Paggett*, of, in, and to the said demised premises theretofore of the said *Charles Bartholomew*, by assignment thereof, came to and vested in the defendant; whereupon and whereby he entered into and upon all and singular the demised premises, with the appurtenances, and became and was thereof possessed, and continued so thereof possessed from thenceforth hitherto: and that the said *Charles Bartholomew* being so seised as aforesaid, theretofore, and in the life-time of the said *Charles*, the said *Eleanor* and *Archdall* died; and that, afterwards, and during the said term, to wit, on the 5th *January*, 1822, the said *Charles* made and published his will, duly attested to pass real estates, and thereby gave and devised the said demised premises of him the said *Charles*, to the plaintiffs and their heirs: and the said *Charles*, afterwards, to wit, on &c., died *so seised of the reversion* of and in the said demised premises of the said *Charles*, without altering his will as to his said devise of the said demised premises; whereupon and whereby the plaintiffs *became seised* of the said reversion of and in the demised premises:" and the plaintiffs further said, "that, after the making of the indenture, and during the term thereby granted, and after the death of the said *Charles*, and after the assignment, and whilst the defendant was so possessed, and while the plaintiffs were seised of the reversion as aforesaid, to wit, on &c., the sum of 10*l.* of the rent aforesaid, for two quarters of a year of the said term, then, and since the death of the said *Charles*, elapsed, became and was due and owing, and still is in arrear and unpaid to the plaintiffs, contrary to the tenor and effect of the indenture, and of the covenant of *Paggett*, so by him in that behalf made as aforesaid:" and the plaintiffs further said, "that the defendant did not nor would, after the said assignment, and after the death of the said *Charles*, and

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during the continuance of the said demise, and whilst the defendant was so possessed of the demised premises, well and sufficiently repair the same; but, on the contrary thereof, suffered and permitted them to be ruinous and out of repair.

The defendant pleaded, *first*, "that the indenture in the declaration mentioned was not the deed of the said *John Paggett*." *Secondly*, "that all the estate, &c., of *Paggett*, in and to the demised premises in the declaration mentioned, by assignment thereof legally made, did not come to and vest in the defendant." And *lastly*, "that no part of the said supposed yearly rent of 40*l.* in the declaration mentioned, was or is in arrear from the defendant to the plaintiffs." On these pleas issues were joined.

At the trial, before Mr. Justice *Burrough*, at *Westminster*, at the Sittings after the last *Michaelmas* Term, the Jury found a verdict for the plaintiffs—Damages, 670*l.*

Mr. Serjeant *Wilde*, in the course of the last Term, moved in arrest of judgment, and submitted, that the declaration could not be supported, the title of *Charles Bartholomew*, one of the original lessors, under whom the plaintiffs claimed, being imperfectly set out; as, at the commencement, it was merely stated that he was *seised* generally, without shewing the nature of his interest, or what estate he had in the premises demised; and it was afterwards averred, that he, *being so seised*, devised the premises to the plaintiffs and their heirs, who, by virtue thereof, *became seised* of the reversion of the demised premises. The seisin of the devisor, therefore, was not only defectively stated, but that also of the plaintiffs who claimed under him; as the former might not have had a sufficient interest in the premises to devise to the latter in fee; and, if he were only seised for life, or for years, he could neither have demised the premises to *Pag-*

gett for the term of forty-five years, nor could he have devised them to the plaintiffs in fee.

Mr. Serjeant *Taddy* now shewed cause. There is no solid foundation for the objection to this declaration. At all events, the defect, if any, is cured by verdict. The count states that the plaintiffs *were seised of the reversion*, and that, while they were so seised, two quarter's rent became due from the defendant, and that he allowed the premises to be out of repair. The defendant has merely pleaded, that *Paggett's* estate in the premises did not vest in the defendant by assignment, and he has not traversed the plaintiffs' seisin, or the seisin of their testator. It must now, therefore, be assumed, that the Jury found that *Bartholomew* was *seised in fee;* for, although the word *seised* may bear different interpretations, yet generally it means a seisin in fee. It is at least ambiguous; and if a word in a declaration be capable of two senses, and the defendant have not traversed or put it in issue, it must, after verdict, be taken in the sense which will best support the declaration. For, as Mr. Justice *Bayley* said, in *Hobson* v. *Middleton* (*a*), "Although in general, in pleading, an equivocal expression is to be construed against the party using it, yet where the opposite party has pleaded over, that is an admission that the expression is to be taken in that sense which will support the previous pleading." And his Lordship referred to *Avery* v. *Hoole*, where Lord *Mansfield* said (*b*): "A verdict will not mend the matter, where the gist of the action is not laid in the declaration; but it will cure ambiguity." In the case of the *King* v. The Bishop of *Landaff* (*c*), it was held, that although it was necessary to allege a presentation in a *quare impedit*, yet that the want of such allegation might be cured by verdict. And Lord *Hardwicke*, in delivering

(*a*) 6 Barn. & Cress. 302. (*b*) Cowp. 826. (*c*) 2 Str. 1006.

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the judgment of the Court, said: "If a presentment admits a seisin in gross, it is to a common intent included in the verdict, and this will only be a title defectively set forth; in which case, according to *Hale* (*a*), the Court will intend any thing to make it good. If the true ground be, that it is only to shew *comment* he was seised, it is one of the least defects a verdict can cure; because the existence of the thing is admitted, and the doubt only upon the manner of it. An heir must shew *comment* heir; but if he does not, and the other does not demur, the finding him heir will cure it (*b*)." In *Lewis* v. *Weeks* (*c*), the Court said, that, where an executor brings debt for rent, on a lease by the testator, and doth not set forth the title his testator had, and it might be such as the rent should go to the heir, yet after verdict they would intend such a title in the testator as should give the executor the rent. So, here, the Court will infer that *Bartholomew* was seised *in fee*.

Mr. Serjeant *Wilde*, in support of his rule.—The plaintiffs have not, in fact, set out any title in their declaration. They have not shewn that *Bartholomew*, under whom they claimed to be entitled to the reversion, possessed such an estate as was capable of being devised. It was not in the knowledge of the plaintiffs whether he were seised in fee simple, or in tail; and even if he were seised for life only, it would have warranted the general allegation that he was *seised* of a moiety of the premises. Mr. Serjeant *Williams*, in a note to *Thursby* v. *Plant*, takes the following distinction, *viz.* that (*d*) where the plaintiff declares in covenant upon a demise by himself, he is not obliged to set out any title to the lands demised; but, in an action by an assignee of the reversion, he must set out the title of the

(*a*) In *Polexfen* v. *Crispen*, 1 Vent. 123.

(*b*) See the Duke of *Newcastle* v. *Knight*, 1 Lev. 190.

(*c*) 1 Show. 71.

(*d*) 1 Wms. Saund. 233 a, n. (2).

lessor to the demised premises, that it may appear he had such an estate in the reversion as might be legally assigned to the plaintiffs. And here, the declaration is so framed as to preclude the defendant from taking issue on the lessor's title; and he could not dispute the seisin, having accepted the lease and entered under it. The mere statement, at the commencement of the declaration, that *Bartholomew* was seised, is consistent with any estate of freehold; and the general averment, that he, being *so seised* as aforesaid, devised the premises to the plaintiffs, refers to the general seisin: and unless he had been seised *in fee*, they could not have been entitled to the reversion under his will. The authorities are uniform to prove, that it is necessary for a plaintiff to shew in his declaration a sufficient estate in the party from whom he derives title. In *Comyns's Digest*, it is said (*a*), that if the plaintiff derive an estate from *A.*, he ought to shew that *A.* had such an estate as enabled him to make the estate to the plaintiff; as, if a man entitle himself to a rent by a grant from *B.*, he must shew what estate *B.* had, whereby it may appear that he could grant such rent. In *Sanders* v. *Hussey* (*b*), the plaintiff in replevin demurred specially to an avowry, and assigned for cause, that the defendant had not set forth of what estate he was seised, whether in fee simple, fee tail, or for life; but only a general seisin, which is not traversable: and the Court adjudged it to be ill, as being matter of substance. In *Comyns's Digest*, it is said (*c*), in debt for rent by an executor on a lease for years by his testator, if he say that the testator was possessed for years, and demised it to the defendant for a less term, he ought to shew the commencement of the testator's term, and that his lessor was seised of such an estate that he *could* make

(*a*) Tit. "Pleader," (C. 36).
(*b*) Carth. 9.
(*c*) Tit. "Pleader," (C. 36), pl. 3.

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such lease. In *Viner's Abridgment* (*a*), where covenant was brought by an heir against an assignee for rent, it seems, that, this being brought on the title, the title ought to be set forth in the declaration, and that the want thereof will not be made good by verdict—and *Willet* v. *Boscomb* (*b*) is referred to as an authority. Again (*c*), in *scire facias*, a man pleaded that his father was seised of the manor, and died seised, and that it descended to him as son and heir; and the Court held that he ought to shew of what estate his father was seised—and *Brooke's Abridgment* (*d*), citing *24 Edw. 3, 75*, is referred to. In *Carvick* v. *Blagrave* (*e*), in covenant for non-payment of rent on an indenture, by the assignee of the lessor against the lessee, the declaration alleged that the lessor was possessed for the remainder of a term of twenty-two years, commencing from the 25th *December*, 1797, and that, on the 7th *March*, 1811, he, by indenture, demised to the defendant, to hold from the 20th *December* then last past. The defendant pleaded that the lessor was not, at the time of making the indenture, possessed for the residue of the said term, *modo et formâ;* and it was held that the plea was good, as the averment in the declaration was material and traversable. Here, however, the declaration merely stated that *Bartholomew* was seised, without shewing of what estate, and that, being so seised, he devised to the plaintiffs in fee, whereby they became seised of the reversion; and that, whilst they were so seised, the rent became due. It would have been nugatory to have traversed the seisin of *Bartholomew;* for it is quite clear that a *virtute cujus* is not traversable (*f*). As, therefore, the plaintiffs' title is, to say the least of it, imperfectly set out in the decla-

(*a*) Tit. "Title," (D), 16.
(*b*) 11 Mod. 179.
(*c*) Vin. Abr. tit. "Title," (F), 1.
(*d*) Tit "Pledings," pl. 33.
(*e*) 4 B. Moore, 303; *S. C.* 1 Brod. & Bing. 531.
(*f*) 1 Wms. Saund. 23, n. 5.

ration, and was not traversable by the defendant, it is not aided by verdict.

Lord Chief Justice BEST.—The plaintiffs' title is certainly very imperfectly set out in the declaration; but if, after verdict, enough appear on the face of the record to warrant the finding, it is sufficient. It is quite clear, that where the assignee of a reversion sues in covenant, he must deduce his title from the original lessor, and shew such title in his declaration; and here the plaintiffs have in fact done so. Although in the commencement of the declaration they have alleged, that *Bartholomew*, one of the original lessors, who survived the two others, was *seised* of an undivided moiety, which was an ambiguous expression, as it might apply either to a seisin in fee simple, fee tail, for life, or for years; yet the ambiguity is cured by pleading over. It is further averred, that *Bartholomew, being so seised*, devised the premises to the plaintiffs *in fee*, and that he died so seised of the reversion, whereby the plaintiffs became seised; and that, while they were so seised, rent became due from the defendant. Although, therefore, the plaintiffs' title is set out in a confused manner; yet sufficient appears to shew that the original lessor had a title to the premises demised, and that his interest was transferred to the plaintiffs. The covenant by *Paggett*, the original lessee, for the payment of rent, was made with *Bartholomew*, his heirs and assigns; and the plaintiffs have shewn that his interest in the premises was vested in them, as heirs. I am, therefore, of opinion, that the declaration is sufficient after verdict.

Mr. Justice PARK, and Mr. Justice BURROUGH concurred.

Mr. Justice GASELEE.—It certainly would have been far more correct to have set out the nature of the seisin of

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Bartholomew, the plaintiffs' devisor, at the commencement of the declaration; but the plaintiffs have averred that he, *being seised*, devised the premises to them and their heirs, and died seised of the reversion, whereby they, the plaintiffs, became seised thereof; and that whilst they were so seised the rent became due. In the case of *Willet* v. *Boscomb* (*a*), referred to in *Viner's Abridgment*, an heir brought an action of covenant against an assignee, for rent; but it was not set forth in the declaration, that his father was seised of any estate when he made the demise, but only generally, "*quod cum demisit*," &c. It was moved, in arrest of judgment, that the declaration was ill, the plaintiff not shewing a title in his father; and on *Scavage* v. *Hawkins* (*b*) being referred to, where, in debt on a lease for years, the plaintiff declared that his father was seised in tail, but did not shew when the estate began, Lord Chief Justice *Holt* said, "the case of *Scavage* v. *Hawkins* is well on issue joined, because it shews the father was seised; and so it would have been well on demurrer." There, too, the plaintiff had judgment, and the objection was raised on a writ of error. With respect to the case of *scire facias*, referred to by *Viner*, it does not appear, in *Brooke's Abridgment*, or in the *Year Book*, whether the objection was raised by plea, or on demurrer, or after verdict.

Rule discharged.

(*a*) 11 Mod. 179. (*b*) Cro. Car. 571.

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JONES and Another *v.* STUDD.

To a declaration in *assumpsit*, containing a count on a bill for 857*l.* 10*s.*, with a count for goods sold, and the usual money counts, the defendant pleaded —as to the *second* and subsequent counts, except as to the sum of 857*l.* 10*s.*—*non assumpsit;* and—as to the said sum of 857*l.* 10*s.*,—that, after the making of the promises, and before the commencement of the suit, he drew a bill on *F., L., & Co.* for that sum, and indorsed it to the plaintiffs, to whom the defendant was still liable on it; and—as to the promise in the *first* count mentioned—that, before the said bill became due, the plaintiffs indorsed it to third persons, to whom the defendant was still liable. On an affidavit that the plea was *false:*—The Court ordered it to be struck out, unless the defendant would consent to withdraw it, and undertake to plead issuably within *two* days, and to take short notice of trial for the Sittings after the Term.

THIS was an action of *assumpsit* brought by the plaintiffs as indorsees, against the defendant as the drawer, of a bill of exchange, dated the 27th *September*, 1826, for 857*l.* 10*s.*, payable to one *Thomas Lupton*, or order, at eighteen months after date, and by him indorsed to the plaintiffs. The declaration contained a count on the bill, as well as a count for goods sold and delivered, and the usual money counts. Plea—as to the *second* and subsequent counts of the declaration, except as to the sum of 857*l.* 10*s.*, parcel of the said sums in those counts mentioned,—that the defendant did not undertake or promise in manner and form as the plaintiffs had above thereof complained against him; and of this he put himself upon the country, &c.: And,—as to the said sum of 857*l.* 10*s.*, parcel of the said sums in those counts mentioned,—that the plaintiffs ought not to have or maintain their action against the defendant as to that sum; because, after the making of the said several promises in the declaration mentioned, and before the commencement of the suit, to wit, on the 1st *April*, 1828, the defendant drew his certain bill of exchange on Messrs. *Fraser, Living, & Co.*, requiring them, eighteen months after the date thereof, to pay to one *Thomas Lupton*, or order, the sum of 857*l.* 10*s.*, and that the persons to whose order the payment was to be made, indorsed the bill, and delivered it so indorsed to the plaintiffs, by reason whereof the defendant became and was, and still is, liable to pay them the sum therein specified. And this &c., wherefore, &c.: And,—as to the supposed promise and undertaking in the *first* count of the declaration mentioned,—that, long before the said bill became due and payable, to wit, on the 1st *January*, 1828, the plaintiffs indorsed it, and directed and appointed the contents thereof to be paid to certain persons to the defendant yet unknown,

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and delivered the bill, so indorsed, to them, and which remained in their hands; by reason whereof the defendant became and was, and is still, liable to pay to them the said sum in the declaration mentioned. And this &c., wherefore &c.

On an affidavit by one of the plaintiffs, that the bill of exchange on which the action was brought, was indorsed to them by *Lupton*, within a few days after the date thereof, as a security for the payment of 357*l.* 10*s.*, due to the plaintiffs for stores supplied to a ship of which the defendant was master; that, since the bill became due, and the defendant had received notice of its dishonour, he had written to the plaintiffs requesting their indulgence; that the bill had remained in their possession from the time it was indorsed to them by *Lupton* until the 18th *February* last, when it was sent to their bankers to be discounted, and that, when it became due and was dishonoured, it was returned to the plaintiffs, who immediately gave the bankers a check for the amount; that the bill had not, in any other way, been put in circulation or negotiated by the plaintiffs; that it had not been out of their possession since it was returned to them by their bankers, until they sent it to their attorney for the purpose of enabling him to commence this action; that so much of the defendant's plea as alleged the indorsement to them, the plaintiffs, on the 1st *April*, 1828, and also so much of the plea as alleged the bill mentioned in the first count of the declaration to be in the hands of persons to whom the plaintiffs were stated to have indorsed the same, was altogether *false:* and that the plaintiffs believed it was pleaded for the mere purpose of creating delay, and that the defendant had no valid defence to the action—

Mr. Serjeant *Taddy*, on a former day in this Term, obtained a rule *nisi* that this plea might be struck out, on the ground that it was calculated to perplex and harass the plaintiffs, and to put them to expense.

Mr. Serjeant *Jones* now shewed cause.—The plaintiffs cannot require the Court to decide on the validity of this plea, on a mere affidavit that they believe part of the statement therein contained to be false. The defendant, as the plea is framed, did not require a rule to plead several matters; nor can he be called on to verify his plea. The Courts will only interfere to set aside a plea in three cases;—*first*, where it is clearly absurd upon the face of it, or raises a question of law by which the time of the Court would be improperly taken up; *secondly*, where it is calculated to raise issues requiring different modes of trial; and, *lastly*, where it renders it necessary for the plaintiff's attorney to consult counsel.—Here, however, the plea is good upon the face of it, the defendant having pleaded the general issue to the second and subsequent counts of the declaration, except as to the sum of 857*l.* 10*s.* in those counts mentioned; and, as to that sum, that he drew a bill to that amount on persons who indorsed it to the plaintiffs; that they had afterwards indorsed it to persons unknown to the defendant; and that it was still outstanding and remaining in the hands of the indorsees. That is a question of fact which the Court cannot try on motion. The plaintiffs may demur. In *Smith* v. *Backwell* (*a*), in an action against the drawer of a bill of exchange, he pleaded the delivery of wine in satisfaction; and the Court refused to allow the plaintiffs to sign judgment as for want of a plea, although it was sworn that the plea was altogether false; and Mr. Justice *Park* there said, that the rule lately adopted was, "that, if a false or sham plea were calculated to raise issues requiring different modes of trial, or were so ingeniously drawn as to perplex the plaintiff, or make it necessary for his attorney to consult counsel, and thereby cause delay and expense, the plaintiff might sign judgment as for want of a plea." Nei-

(*a*) 1 Moore & Payne, 338; *S. C.* 4 Bing. 512.

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ther of those objections apply to the present plea; and there is consequently no ground for this application.

Mr. Justice PARK (*a*).—This plea certainly tends to perplex the plaintiffs. The case of *Smith* v. *Backwell* is altogether distinguishable, as the defendant there pleaded accord and satisfaction, in the usual way; and therefore we could not say that it was fallacious or fictitious on the face of it. The affidavit made by one of the plaintiffs may be laid out of the question. If the defendant had required a rule to plead several matters, and the substance of this plea had been stated to us (which we said, in *Smith* v. *Backwell* (*b*), that we should in future require), we would not have allowed it to be pleaded. I am, therefore, of opinion that this rule must be made absolute; or the plea may be withdrawn, on the terms of the defendant's undertaking to plead issuably within *two* days, and to take short notice of trial for the Sittings after Term.

Mr. Justice BURROUGH.—It is evident that this plea is a mere trick, and calculated to mislead and harass the plaintiffs. If it were true, the defendant might avail himself of the facts therein stated, under the general issue; but even then, it would not afford him a substantial defence to the action.

Mr. Justice GASELEE.—It appears to me that this plea would be bad on demurrer, as it is not averred that the bill drawn by the defendant on the 1st *April*, for 857*l.* 10*s.*, and indorsed to the plaintiffs, was accepted by them in satisfaction. The question is, whether, taking the whole of the plea together, it does not raise different issues, so as to require different modes of trial. The last

(*a*) Lord Chief Justice *Best* was absent. (*b*) 1 Moore & P. 338.

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part of the plea—that the plaintiffs have indorsed the bill to persons unknown to the defendant, and that it remains in their hands—is clearly in the nature of a sham plea. The application to set aside the plea, appears to me to be an act of mercy towards the defendant, as the plaintiff might have signed judgment as for want of a plea. I concurred with the Court in their decision in *Smith* v. *Backwell*, on the ground that the plea there was the common plea of accord and satisfaction, and involved no difficulty upon the face of it; nor was it so subtilly framed as to require the advice of counsel; nor did it raise distinct issues, so as to require different modes of trial. Here, however, the plea appears to me to fall within the principle laid down by the Court of *King's Bench*, in *Blewitt* v. *Marsden* (*a*), where they said, "that there might be occasions where they would not enter into any question as to the truth of a plea of judgment recovered pleaded in the usual form, upon motion, but await the time for producing the roll, when such a plea would be regularly disproved; but they expressed great indignation against the abuse, which had grown up of late and was continually increasing, of loading and degrading the rolls of the Court with sham pleas of this nonsensical nature, making them the vehicles of indecorous jesting; by which it sometimes happened that the time of the Court, which ought to be better employed, and was sufficiently engaged with the real business of the suitors, was taken up in futile investigations of nice points which might arise on demurrer to such sham pleas."

Rule absolute.

(*a*) 10 East, 237

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In order to shew a witness interested, it is necessary to prove that he has an *immediate* interest in the event of the suit, or must derive a *certain* benefit from its determination one way or the other. Therefore, in trover for a barge, which the plaintiffs claimed under a purchase from one *B.*, and which the defendants also claimed under a purchase from one *W.*, who they alleged to have brought it from *B.*, *B.* was called as a witness, when, on an objection being taken to his competency, on the ground of interest, he was released by joint and several releases from the defendants and *W.*:—*Held*, that the release by *W.* rendered *B.* a competent witness.

RADBURN *v.* MORRIS and Another.

THIS was an action of *trover*, for a barge. At the trial, before Mr. Justice *Burrough*, at *Guildhall*, at the Sittings after the last Term, the plaintiff claimed the barge under a purchase from one *Buckman*, whose receipt for the payment of the purchase-money by the plaintiff, was given in evidence. The defendants, who were in partnership as barge-builders, claimed the barge under a person of the name of *Wilson*, who, they said, also purchased it of *Buckman*, and for whom they had repaired it. For the purpose of supporting the defendant's claim, *Buckman* was called as a witness, when an objection was taken to his competency, on the ground of his having an interest in the result of the cause. A joint and several release of *Buckman*, by *Wilson* and both the defendants, was then tendered, and it was objected to, as it had only one stamp. Another release was then tendered, which was signed in Court by the defendant *Morris* alone; this being also objected to, a separate release by *Wilson* was then executed. It was insisted, that that too was insufficient to restore the competency of *Buckman*; and, the learned Judge being of that opinion, the Jury found a verdict for the plaintiff, damages 120*l.* the sum proved to have been paid by him for the barge.

Mr. Serjeant *Bompas*, in the last Term, obtained a rule *nisi* that this verdict might be set aside, and a new trial granted, on the ground, that the testimony of *Buckman* had been improperly rejected and ought to have been received. He submitted, that the defendants had no remedy against *Buckman*, as there was no existing contract between them; the only ground on which the defendants claimed the barge, being under *Wilson*, who they alleged had purchased it from *Buckman*. In *Ward* v. *Wilkinson* (*a*), it was held, that, in trover by *A.* against *B.*,

(*a*) 4 Barn. & Ald. 410.

C. was a competent witness to prove property in himself; and Mr. Justice *Holroyd* referred to *Nix* v. *Cutting* (*a*), and confirmed the doctrine there laid down; which is expressly in point. There, in an action of trover for a horse, a person who accepted it as a security for the payment of a sum of money, and afterwards, on default, sold it to the defendant, was held competent to prove these facts; as the verdict could not be evidence in favour of the witness in any case. Even if *Buckman* might be considered as an interested witness in the first instance, his competency was restored by the joint and several releases of *Wilson* and both the defendants, which only required *one* stamp, as it applied to one and the same transaction; and, although it was executed by different persons, it is immaterial; for a general release given to a debtor by several creditors, requires only one stamp; and here, the instrument was stamped with a deed-stamp, amounting to 1*l.* 15*s.*, as required by the statute 55 *Geo.* 3, c. 184, Sched. Part 1. In *Goodson* v. *Forbes* (*b*), where several under-writers on a policy, entered into an agreement to refer the cause to arbitration, it was held, that the agreement and the award required each but one stamp, there being a community of interest between the parties in the subject-matter. In *Doe* d. *Copley* v. *Day* (*c*), a paper containing contracts by several persons relative to different things, though stamped with a single stamp, was held to be good evidence as to one of the contracting parties, because the stamp appeared to be applicable exclusively to his name. So, an assignment of the prize-money of several seamen on board a privateer, being payable out of one fund, requires only one stamp—*Baker* v. *Jardine* (*d*). At all events, the separate release by *Wilson* to *Buckman*, which was in general terms, was sufficient to restore the competency of the latter, as

(*a*) 4 Taunt. 18.
(*b*) 1 Marsh. 525; *S. C.* 6 Taunt. 171.
(*c*) 13 East, 241.
(*d*) Id. 235, n.

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the defendants claimed under *Wilson* alone, and had no demand, direct or indirect, on *Buckman*.

Mr. Serjeant *Wilde* now shewed cause. *Buckman's* testimony was properly rejected; for neither of the releases tendered at the trial restored his competency. He was clearly interested in the result of the cause, having a stronger bias in favour of the defendants than of the plaintiff; because, if the latter had succeeded, the defendants might have recovered against *Wilson* the value of the barge and the costs incurred in this action, and *Wilson* would have been entitled to recover against *Buckman*, not only the value of the barge and the costs of this action, but also the costs of *Wilson's* suit; whereas, if the defendants had succeeded, *Buckman* would only have been liable to the plaintiff for the value of the barge. In *Adamson* v. *Jarvis* (*a*), the plaintiff, an auctioneer, sold goods by the order of the defendant, who had no right to dispose of them, and the true owner afterwards recovered against the plaintiff; and it was held, that he might recover as against the defendant, not only the value of the goods recovered by the owner, but also the costs of the action brought against him for the recovery thereof, which was alleged by way of special damage in the declaration. Here, *Buckman* was called for the purpose of impeaching the sale of the barge to the plaintiff; and, if the latter obtained a verdict against the defendants, the record would be evidence against *Buckman*, in an action by them, of the amount of the damages recovered. The defendants had a qualified lien on the barge, for the repairs done; and an absolute lien as against *Wilson*: and both the plaintiff's and defendants' claims would arise from *Buckman*, as he sold the barge to the plaintiff, and afterwards to *Wilson*. Although, if the plaintiff failed in the action, the verdict would not be evidence against *Buck-*

(*a*) 4 Bing. 66.

man; yet it would be evidence for the defendants, in case the plaintiff should recover. *Buckman*, therefore, was an incompetent witness. But it has been said that his competency was restored by the releases tendered at the trial. With respect to the first, *Wilson* and the defendants were different parties, and had distinct interests. It was a general release of the respective claims of particular parties, and not a release touching any transaction which shewed a community of interest. It, therefore, required *two* stamps at least. The three releasors remised and released to *Buckman*, all actions, demands, &c., which they or either of them had. It, therefore, operated as a release of all joint and separate demands; *Wilson* having a distinct right as far as he was concerned, and the defendants a separate and independent right, as partners. Although several under-writers on a policy may enter into an agreement to refer, yet it is on the ground that they have a joint interest in the subject-matter, and are all bound to contribute in case of loss. So, prize-money due to several seamen is payable out of one fund; or they may have a joint interest, as in the Whale Fishery, where each receives a proportion of the profits of the voyage in lieu of wages. With respect to a general release given by several creditors, they are all jointly interested in the funds of the debtor, and the mutuality of the release creates the consideration. Here, however, there was no joint fund as between *Wilson* and the defendants, and no joint interest to be released; but each had a separate and distinct claim. As to the second release, it was signed by one of the defendants only; and his having executed it for himself and his partner, could not operate so as to bind the latter. The action was brought against the defendants as tort-feasors, and as such they were severally liable. One of them could not have claimed contribution from the other, and the plaintiff might have proceeded to judgment, and levied execution against the defendant who had not signed. In order, therefore, to render the

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release by the defendants valid, they should both have signed it, or should individually have released the witness. The last release, which was executed by *Wilson* alone, was not sufficient to restore the competency of the witness, for he had no *certain* interest to release. The plaintiff had commenced proceedings against the defendants alone, and if he recovered from them, it does not follow that *Wilson* would sue *Buckman*. If *Wilson* had died, the defendants would have had their remedy against *Buckman*, as they would have sustained a damage by his wrongful act.

Mr. Serjeant *Bompas*, in support of his rule.—The witness was improperly rejected. In the first place, there was no interest between *Buckman* and the defendants, of which the law can take notice. In order to render a witness incompetent, on the ground of interest, he must have an *immediate* interest in the event of the suit, and not a remote or probable interest. In case the plaintiff had recovered against the defendants, they could not have sued *Buckman*. Their only remedy would have been by an action against *Wilson;* and he perhaps might have been entitled to recover against *Buckman*. In *Carter* v. *Pearce*, the Court said (*a*), " that the bare possibility of an action being brought against a witness, was no objection to his competency;" and Mr. Justice *Buller* said: " In order to shew a witness interested, it is necessary to prove that he must derive a *certain* benefit from the determination of the cause one way or the other." In a late case on a warranty of a horse, a person was called as a witness who had no immediate interest in the result of the cause; and, although it was objected, that, if he could shew that the horse was unsound, it might have reference to the previous warranty, yet, it was held, that his testimony was admissible, as he had no interest in the event of the suit, and that, whether the plaintiff or defendant succeeded, the verdict

(*a*) 1 Term Rep. 164.

could not be given in evidence either for or against him. So, the verdict in this case could not be given in evidence against *Buckman* in an action at the suit of *Wilson*. In *Abrahams* v. *Bunn*, Lord *Mansfield* took a distinction between *interest*, which affects the *competency* of a witness, and *influence*, which goes only to his *credit* (*a*); and his Lordship referred to the case of *Bailie* v. *Wilson*, where, on the proof of a will before the delegates, they were equally divided as to whether the objection should go to the competency or credit of the only witness who proved a codicil, subsequent to a second will, setting up again the first will; and no sentence being given, a commission of adjuncts issued; a majority of whom held, that it went only to the credit, and sentence was given for the first will; and, on a petition for a commission to review, the case was fully argued; and Lord *Hardwicke* gave a solemn opinion, with the majority of the adjuncts, "that the witness having administered under the first will as agent to the executor, or as executor *de son tort*, and being liable to actions, the objection went only to the credit, not to the competency." Here, however, the witness had no *immediate* interest in the result of the suit, nor was he liable to any action that might arise out of it; and, as the defendants could not have sued him, as there was no privity between them, he was a competent witness for them without being released. The learned Serjeant was proceeding with his argument, when he was stopped by the Court.

Lord Chief Justice BEST.—I am clearly of opinion, that the defendants could not maintain any action against *Buckman*. In case the plaintiff had recovered, the defendants' only remedy would have been against *Wilson*, under whom they claimed. If, therefore, the defendants could not have sued *Buckman*, no release by them to him was necessary,

(*a*) 4 Burr. 2254.

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as they had no right of action against him, at the time the release was executed. With respect to *Wilson*, I very much doubt whether a release from him to *Buckman* was necessary; as, if it were, the mere possibility of an exposure to an action, even after a hundred persons had tried the cause, might render it necessary for all to release in succession. It is far better that an objection to the competency of a witness, on the ground of interest, should be confined to his *immediate* interest in the cause, and not be allowed to extend to a remote possibility of interest. But, if *Wilson* had a right of action against *Buckman* at the time the release was executed, the release was sufficient to extinguish it. Although a party cannot release all causes of action that may arise or accrue after the execution of the release; yet, if, at the time of the execution, the transaction has occurred, or the amount of the injury out of which a future action may arise against the party to whom the release is given, has been ascertained, there is no reason why a party should not bar all rights that might accrue to him in respect of such bygone transaction. A general release of all actions and causes of action for any matter which has happened, down to the time of the release, will discharge the releasee from all liability depending on the event of the existing suit, and will operate on a transaction already past, which was to lay the foundation of a future liability. Here, *Wilson* released *Buckman* from all actions, and all cause and causes of action, suits, &c., which *Wilson* then had, and which should there-after arise by reason of any matter, cause, or thing whatsoever, from the beginning of the world to the day of the date of the release; and the witness was, consequently, discharged from all liability depending on the event of the suit, or on an inchoate cause of action then existing.

Mr. Justice PARK.—I confine my opinion to the last point only. The release by *Wilson* to *Buckman* rendered

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the latter a competent witness. The defendants could not have sustained any action against him if they had failed in the action brought against them by the plaintiff, as their only remedy was against *Wilson;* and, although *Wilson* might perhaps have been placed in a situation to sue *Buckman*, yet, as he released him, he was clearly a competent witness for the defendants.

Mr. Justice BURROUGH declined giving any opinion.

Mr. Justice GASELEE.—It is quite clear that the defendants could not maintain any action against *Buckman.* It is, therefore, unnecessary to say whether the first release, by *Wilson* and the defendants together, were valid or not; but I am strongly inclined to think that it was, as it related to one single act in which all the releasors were concerned. The liability of the three to the plaintiff, depended on the validity of the sale of the barge by *Buckman* to *Wilson.* They may, therefore, be considered as standing in the situation of parties having a community of interest, or subscribing to a common fund. The release, however, by *Wilson* to *Buckman* was sufficient to protect the latter against all causes of action by the former, to the date of that instrument; and discharged *Buckman* from all liability for the *tort* he had committed by selling to *Wilson* the property of another person. The statute of limitations would have begun to run from the time of the sale (*a*); and as *Buckman* could only have been liable to an action at the suit of *Wilson*, the release executed by him restored the competency of *Buckman* as a witness. This rule, therefore, must be made—

Absolute.

(*a*) See *Brown* v. *Howard*, 4 B. Moore, 508.

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Monday, May 12th.

The plaintiffs insured goods for the defendants, pursuant to an undertaking to effect the insurance with such names as should be to the defendants' *satisfaction*. After the arrival of the vessel, the defendants objected to reimburse to the plaintiffs the premiums paid by them, on the ground that the names of the underwriters had not been previously submitted to them for their *approval*:—*Held*, that the plaintiffs had sufficiently complied with the terms of their agreement.

DIXON and Another *v.* HOVILL and Another.

THIS was an action of *assumpsit*, brought to recover the freight of certain timber and deals, shipped by the defendants on board a vessel called *The Brothers*, of which the plaintiffs were owners, and by them delivered at the *Cape of Good Hope;* as also the sum of 10*l.* 19*s.* paid by the plaintiffs for the insurance of the timber. The defendants paid the amount of the freight into Court.

At the trial, before Mr. Justice *Gaselee*, at *Guildhall*, at the Sittings after the last *Michaelmas* Term, it appeared, that, in *October*, 1826, the defendants offered, through the plaintiffs' brokers, to ship a quantity of timber and deals consigned to the *Cape*, to which place the plaintiffs' vessel, then lying in the port of *London*, and taking in freight, was bound; that the freight was accepted, and, after the timber was put on board, the defendants instructed their broker to effect an insurance on it; but that, the surveyor at *Lloyd's* having reported that the vessel was not sea-worthy, they could not get an insurance effected, even at the usual rate for a second class ship; and that in fact they could not procure any policy to be under-written; that, in consequence, the defendants insisted upon taking the timber out of the ship; to avoid which, the plaintiffs agreed to become the insurers; and one of them wrote the defendants the following letter:—

" Messrs. *R. Hovill & Sons*,

" Gentlemen,—I hereby hold myself responsible to effect an insurance for your goods on board *The Brothers*, *Briggs*, Captain, *(Cape of Good Hope)*, value 300*l.*, at 40*s. per cent.*, with such names as shall be to your satisfaction, you paying such premium. *Thomas Dixon*, Senr."

" *November* 11*th*, 1826.

"P. S.—If the premium of second class insurance should

exceed 40*s.*, such premium as is given, we have no objection to pay.

S. Hovill."

The plaintiffs accordingly effected an insurance in the name of their brokers, on "timber and deals valued at 300*l.*, and ship, &c., valued at 700*l.*;" and the policy was left in the hands of the brokers. The ship sailed in *November*, 1826, performed her voyage to the *Cape*, and afterwards returned home; and the defendants, having refused to pay the plaintiffs for the insurance, the present action was commenced. No evidence was given by the defendants that they had made any application or inquiry as to the names of the under-writers; but it was contended, that the plaintiffs should have sent the defendants the names of the persons subscribing the policy, for their approval, before the insurance was effected; and also, that the plaintiffs had exceeded their authority in causing a policy to be effected *on ship and goods*, as the defendants only required them to effect an insurance on *the goods*. The Jury found a verdict for the plaintiffs; and leave being reserved to the defendants to move to set it aside, in case the Court should be of opinion that either of the above objections was well founded—

Mr. Serjeant *E. Lawes*, in the course of the last Term, accordingly obtained a rule *nisi* that this verdict might be set aside, and instead thereof a nonsuit entered, or a new trial granted; and, in addition to the above objections, submitted, that, as the agreement had been signed by one of the plaintiffs only, he holding himself to be individually responsible, the action should have been brought in his name alone. But the Court held that there was no foundation for the latter objection, as the action was not founded on the undertaking alone, the freight, which formed part of the plaintiffs' demand, having been

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earned, and the premiums of insurance having also been paid by them.

Mr. Serjeant *Wilde* now shewed cause. There is no pretence to disturb the verdict found for the plaintiffs, who were entitled to recover for the premiums of insurance, as money paid on the defendants' account, they having acceded to the terms of the plaintiffs' proposition to effect the insurance at 40*s. per cent.* Although the agreement or undertaking is not precisely or technically drawn, yet it was the evident intention of the parties, not that the names of the under-writers should be submitted to the defendants for their approval, previously to the policy being effected; but merely that the plaintiffs should secure to the defendants the names of such parties as should be satisfactory to them, and sufficient to indemnify them against the loss of their goods, as valued on board the plaintiffs' ship. If a person give an order to a tradesman, he frequently says, that it shall be done to the satisfaction of the party giving the order. So, here, the plaintiffs undertook that the names of the under-writers should be good names, or such as could not reasonably be objected to. But the defendants made no objection to the policy, nor did they even require the plaintiffs to furnish them with the names of the under-writers, until after the ship had returned from her voyage to the *Cape*. They had all the benefit or advantage which might arise to them from the insurance, and they did not attempt to shew that any one of the under-writers who had subscribed the policy had become insolvent, or was not sufficient; and if the names of the under-writers were substantially good, the object of the parties was completely answered. If the plaintiffs had procured the policy to be under-written, and had sent it to the defendants, could their brokers have gone to the under-writers, and said, that their principals did not consider their names to be sufficient, and that they

would not trust them? This case may be assimilated to a case where a party undertakes to pay for goods by a good or satisfactory bill. The policy was, in fact, subscribed by under-writers of undoubted respectability. Although it was objected at the trial, that the plaintiffs had exceeded their authority, in having effected an insurance on ship as well as goods, yet, as the interest in the latter was declared to be, on timber and deals valued at 300*l.*, the defendants might have brought an action on the policy, averring the interest in the timber to be in them; and they might have recovered to the amount of the value stated in the policy. It is quite clear that ship and goods may be insured by one policy: and, although the goods may belong to several persons, yet they have each a right to sue in case of loss. The defendants have had all the benefit of the insurance; and, as the plaintiffs effected it on their account, and paid the premiums accordingly, they were clearly entitled to recover.

Mr. Serjeant *E. Lawes*, in support of his rule.—There can be no doubt as to the legal construction to be put on the plaintiffs' agreement. It is express in terms: and, when it is considered that the defendants could not procure any insurance to be effected in consequence of the plaintiffs' ship being reported not sea-worthy, there can be no doubt. The plaintiffs undertook to effect an insurance with such names as should be to the defendants' satisfaction. It was far from probable that, under the circumstances, the policy would be subscribed by respectable or responsible under-writers: and, therefore, the defendants were entitled to require that the names to be subscribed to the policy should be to their satisfaction. The plaintiffs were, at all events, bound by their agreement to furnish those names, before they could be entitled to demand the premiums from the defendants. There is a wide distinction between satisfaction promised by a party in general terms, or for a special

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purpose. The statute 5 *Geo.* 2, c. 30, s. 16, requires a bankrupt to answer *to the satisfaction* of the commissioners: and Lord Chief Justice *Abbott*, in delivering the judgment of the Court, in *Doswell* v. *Impey*, said (*a*): "The words are, *to the satisfaction of the commissioners*, not, *as ought to be*, or *as reasonably might be, to the satisfaction of the commissioners*, not *satisfactory* generally, but *satisfactory to the commissioners:* so that, by the very words of the section, the commissioners are authorized to commit, if the party shall not fully answer *to their satisfaction*, all lawful questions put to him." In *Thirsby* v. *Helbot* (*b*), an award, that one of the parties should be bound, with such sureties as the other should approve, and that they should then sign mutual releases, was held not to be *final;* on the ground that, if the party disapproved of the surety, he need not sign the release. In *Humphries* v. *Carvalho* (*c*), where a broker sold to the plaintiff on a *Saturday* certain goods of the defendant, for stipulated prices, subject to the plaintiff's approval of the quality upon the *Monday* following; it was held, that it was not a mere offer to sell, but that the buyer had the option of renouncing the purchase on the *Monday;* and that the contract would be binding, if not disapproved before that day had expired. So, here, the plaintiffs undertook to effect the insurance, and to cause the policy to be subscribed with such names as the defendants should approve of or be satisfied with; and the latter had no opportunity of ascertaining the names of the under-writers previously to the commencement of the action, as the policy remained in the hands of the plaintiffs' brokers; nor could the defendants be *satisfied* with them until they had *seen and approved* of them. The defendants, in fact, did not know that any policy had been effected; and, it appeared at the trial to have been done in the name of the plaintiffs' brokers, and effected on ship

(*a*) 1 Barn. & Cress. 173. (*b*) 3 Mod. 272. (c) 16 East, 45.

and goods, in which the plaintiffs exceeded the authority given them by the defendants. That unnecessarily increased the number of the under-writers, and consequently also the difficulty of recovering in case of a loss. If a party order another to take for him a house containing a given number of rooms, he will not be justified in hiring a mansion with double the number.

Mr. Justice PARK (*a*).—This is an application to the Court to set aside the verdict found for the plaintiffs, on two grounds.—*First*, with respect to the construction sought to be put by the defendants on the plaintiffs' agreement, I am of opinion that there is no ground for the objection. One of the plaintiffs thereby undertook to hold himself responsible to effect an insurance on the defendants' goods, on board *The Brothers*, valued 300*l.* at 40*s. per cent.*, with such names as should be to the defendants' satisfaction, they paying such premiums. It has been insisted, that it was the duty of the plaintiffs, previously to effecting the insurance, to transmit the names of the under-writers to the defendants, for their approbation. But, I am of opinion, that the agreement requires no such thing. It was competent to the party insured to have sent or called for the names of the parties subscribing the policy; and, if there had been any objection to them, they might have required a further assurance. But the plaintiffs did not undertake to send the defendants the names of the under-writers. They merely undertook that they should be competent to pay in case of loss. The insurance was effected in *November*, 1826, and the voyage to the *Cape*, which, in the usual course, is a seven months' voyage, was successfully performed. The defendants, during the whole of that period, never required the names of the under-writers to be furnished to them; but laid by and had the benefit of the in-

(*a*) Lord Chief Justice *Best* was absent.

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surance, and now refuse to pay the premiums advanced by the plaintiffs for the policy, by which their property was protected during the whole of the voyage. It has been contended by my brother *E. Lawes*, that the word *satisfaction* in the agreement, must be read as *approbation:* but a party may be satisfied without actual approval. In *Thirsby* v. *Helbot*, the party was to be bound with such sureties as the other should *approve*. So, in *Humphries* v. *Carvalho*, the sale was made on a *Saturday*, subject to the purchaser's *approval* of the quality of the goods on the *Monday* following; and it was most properly decided, that he had the whole of that day to make his election. As to the case of *Doswell* v. *Impey*, it cannot be considered analogous to the present, as there, the commissioners were authorized, by statute, to commit any person who should refuse to answer to *their* satisfaction, which cannot bear the most distant alliance to the case of a contract by which a party engages to hold himself responsible to effect an insurance with such names as shall be to the satisfaction of the party insured.—The second objection is equally untenable. The insurance was effected on the goods; and, although, the policy remained in the hands of the plaintiffs' brokers, still the defendants might have sued and recovered upon it, averring the interest in the goods to have been in themselves; and the brokers might have been compelled to produce the policy for the purpose of the defendants' suing upon it.

Mr. Justice BURROUGH.—I confess I did not understand the nature of the objections, when the application was made. If I had, I should not have concurred in granting the rule.

Mr. Justice GASELEE.—In justice, there can be no doubt but that the plaintiffs were entitled to recover. The defendants had the benefit of the policy; and if the plaintiffs had neglected to cause the insurance to be effected, they

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would have been liable on their agreement. Although the defendants might have had a right to require the plaintiffs to give them the names of the under-writers, within a reasonable time after the making of the agreement, or might have objected to the policy before the commencement of the voyage; yet, as they laid by so long, and made no application until after the return of the vessel, it is now too late for them to raise the objection.

Rule discharged.

Tuesday, May 13th.

DOUGLAS and Another, Assignees of STEIN, SMITH & Co., Bankrupts, *v.* FORBES, Executor of JAMES HUNTER, deceased.

Assumpsit lies in the Courts at *Westminster*, on a *Scotch* decree, obtained in absence against a native of *Scotland*, for a debt contracted in *Scotland*.

Where a *Scotch* decree adjudges interest to be paid, but does not fix the time from which it is to run, it is payable from the day of citation.

No action can be maintained against a party as executor, until he has taken upon himself to act as such, or has proved the will: Therefore, where a testator died abroad more than six years before the commencement of the suit, but his executor in this country had not proved the will, nor in any manner acted as executor until *within* six years:—*Held*, that the statute of limitations was no bar.

THIS was an action of *assumpsit*, founded on two *Scotch* decrees. The declaration contained *twenty-nine* counts. The *first* stated—"That, heretofore, to wit, on the 25th *February*, 1802, a certain decree was made and pronounced in and by the Court of our Lord the then King, before the Lords of Council and Session, at *Edinburgh*, in that part of the United Kingdom of *Great Britain* and *Ireland* called *Scotland*, to wit, at *London*, in and concerning a certain action then depending in the same Court, at the instance of *John Stein*, *Thomas Smith*, *Robert Stein*, *James Stein*, and *Robert Smith*, before they became bankrupts, against the said *James Hunter*, whereby the Lords of Council and Session aforesaid did then and there decern and ordain the said *James Hunter* to make payment to the said *John Stein*, *Thomas Smith*, *Robert Stein*, *James Stein*, and *Robert Smith*, before they became bankrupts as aforesaid, of a certain sum of money, to wit, the sum of

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447*l.* 6*s.* 3*d.*, sterling money of *Great Britain*, and annual rent, that is to say, legal interest, thereof, from a certain day, to wit, the 18th *November*, 1801, and until payment, together with the sum of 50*l.* of like sterling money, as the expense of process, besides the sum of 1*l.* 0*s.* 0½*d.*, sterling money of *Great Britain*, being the full dues of extracting that decree; as by the said decree, remaining in the said Court of Session, at *Edinburgh* aforesaid, more fully appears; which said decree remains in full force and wholly unsatisfied: whereby the said *James Hunter*, in his life-time, became liable to pay to the said *John Stein*, *Thomas Smith*, *Robert Stein*, *James Stein*, and *Robert Smith*, before they became bankrupts as aforesaid, the said sums of money so decreed to be paid as aforesaid, together with such interest as aforesaid, on the said sum of 447*l.* 6*s.* 3*d.*, according to the said decree, when he the said *James Hunter* should be thereunto afterwards requested; and, being so liable, the said *James Hunter*, in his life-time, in consideration thereof, to wit, on the said 25th *February*, 1802, to wit, at *London* aforesaid, undertook, and then and there faithfully promised the said *John Stein*, *Thomas Smith*, *Robert Stein*, *James Stein*, and *Robert Smith*, before they became bankrupts as aforesaid, to pay them the said sums of money so decreed to be paid as aforesaid, together with such interest as aforesaid, when he, the said *James Hunter*, should be thereunto afterwards requested."

The next four counts were upon the same decree, varying the amount of the sum decreed to be paid, as also the date of the day from which interest was payable; and in all of which the promises were laid, by *Hunter* in his life-time, to *Stein, Smith, & Co.* before they became bankrupts, as in the *first* count.

The three next counts stated, that *Hunter* was indebted to *Stein, Smith, & Co.*, for money due and owing under the decree; as also for money lent, and for interest; laying the

promises as before. And the *ninth* count was on an account stated between *Hunter* in his life-time, and *Stein, Smith, & Co.* before they became bankrupts.

The *tenth, eleventh, twelfth, thirteenth, fourteenth,* and *fifteenth* counts were on the same judgment, laying the promises by the defendant, as executor, to the plaintiffs, as assignees, after the death of *Hunter*, and after the bankruptcy of *Stein, Smith, & Co.*

The *sixteenth* count was founded on a decree,—"whereby the Lords of Council and Session decerned and ordained the said *James Hunter* to make payment to the said *Robert Smith*, before he became bankrupt, of the sum of 75*l.* sterling money, and annual rent, that is to say, lawful interest thereof, from a certain day, to wit, the 18th *November*, 1801, and until payment, together with the sum of 20*l.* of like sterling money, as the expense of process, besides the sum of 1*l.* 7*s.* 7½*d.* sterling money, being the full expense of extracting that decree;"—and laying the promise by *Hunter* in his life-time, to *Smith* before he became bankrupt.

The next five counts were on the last-mentioned decree, varying the amount, and the dates of payment of interest; and laying the promises as in the *sixteenth*.

Then followed a count for money due on the decree, a count for money lent, and an account stated; each laying the promise as in the last six.

The *twenty-fifth* count set forth the decree as in the *sixteenth*, laying the promise by the defendant, as executor, to the plaintiffs, as assignees, after the death of *Hunter*, and after the bankruptcy of *Smith*.

Then followed counts for money lent, had and received, and interest, and an account stated; laying the promises as in the *twenty-fifth* count.

To this declaration, the defendant pleaded—*First*, the general issue to the whole declaration, *viz.* "that *Hunter*, in his life-time did not, nor did he, the defendant, since

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the death of *Hunter*, undertake &c."—*Secondly*, as to the fifteen first counts of the declaration,—"that the said several causes of action therein mentioned did not accrue to *Stein, Smith, & Co.* before they became bankrupts, or to the plaintiffs, as assignees, or to any or either of them, at any time within six years next before the commencement of this suit;" and *lastly*,—as to the last fourteen counts,—"that the causes of action therein mentioned did not accrue to *Smith* before he became bankrupt, or to the plaintiffs, as assignees, at any time within six years, &c."

The plaintiffs added a *similiter* to the *first* plea, and replied to the *second*,—as far as the same related to the several causes of action in the first *nine* counts of the declaration mentioned,—"that the said *James Hunter*, before and at the times when the said several causes of action in those counts respectively mentioned accrued to the said *John Stein, Thomas Smith, Robert Stein, James Stein*, and *Robert Smith*, as therein mentioned, was in parts beyond the seas, to wit, in the *East Indies*, and so remained and continued from thence continually, until he the said *James Hunter* afterwards, to wit, on the 8th *December*, 1817, died in parts beyond the seas; and that they, the plaintiffs, as assignees as aforesaid, sued out their writ of *capias ad respondendum* in this cause, and brought their said suit thereupon, against the defendant, as executor as aforesaid, within six years next after he, the defendant, first took upon himself the burthen of the execution of the last will and testament of the said *James Hunter*, in *Great Britain*, (he, the defendant, having been ever since the death of the said *James Hunter*, and still being, the only person having lawful power and authority to execute the said last will and testament in *Great Britain*, and there having been, at and since the death of the said *James Hunter*, no other executor in *Great Britain* of the said last will and testament); and this &c., wherefore &c.:"—and, as to so much of the said second plea, as far as the same relates to the tenth, eleventh, twelfth, thirteenth, fourteenth, and

fifteenth counts,—" that the said several causes of action in those counts mentioned, and each and every of them, did accrue to the plaintiffs, as assignees as aforesaid, within six years next before the commencement of this suit:" on which issues were joined. And, as to the said plea, so far as it related to the said several causes of action in the sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth counts,—" that the said *James Hunter*, before and at the times when the said several causes of action in those counts respectively mentioned accrued to the said *Robert Smith* as therein mentioned, was in parts beyond the seas, to wit, at &c.," (as before): and, as to the said plea, so far as it related to the said several causes of action in the residue of the said declaration mentioned—" that the said several causes of action, and each and every of them, did accrue to the plaintiffs, as assignees as aforesaid, within six years next before the commencement of this suit:" on which issue was also joined.

The defendant added a *similiter* to the replication to the second and last plea, so far as the same related to the tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth, and also to the five last counts of the declaration. And, as to the first nine, and the sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth counts, rejoined, " that the plaintiffs did not sue out their said writ of *capias*, and bring their suit thereupon against the defendant, within six years next after he took upon himself the burthen of the execution of the last will and testament of *Hunter*:" upon which issue was joined.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after the last *Trinity* Term, it appeared that *Hunter*, the defendant's testator, a *Scotchman* by birth, in *January*, 1799, was indebted to Messrs. *Stein & Co.*, merchants in *Edinburgh*, in the sum of 447*l.* 6*s.* 3*d.*, and

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to *Smith*, one of that firm, in 75*l.*, on the balance of accounts between them; and that, on the 31st *May* and the 11th *June* in that year, he admitted that those sums were due; that he shortly afterwards went to *India*, from which country he never returned, but died there on the 11th *December*, 1817, leaving property in *Scotland*, *viz.* a dwelling-house, in which his father lived previously to his death, and also an heritable bond. The respective deaths of *Hunter's* father and mother were proved, as also, that he was entitled to this property as heir-at-law. In *February*, 1802, two decrees were pronounced against him for these two sums, in the Court of Session, one at the instance of Messrs. *Stein & Co.*; and the other at the instance of *Smith*. The first decree was as follows:—

"At *Edinburgh*, the 25th day of *February*, 1802, anent the summons and action raised, intended, and pursued, before the Lords of Council and Session, at the instance of Messrs. *Stein*, *Smith*, & *Co.*, merchants in *London*, and *William Inglis*, writer to the signet, their mandatory, against *James Hunter*, son of the deceased *James Hunter*, vintner in *Edinburgh*, late clerk to the pursuers, now abroad, which summons maketh mention, that *James Hunter*, son of the deceased *James Hunter*, vintner in *Edinburgh*, late clerk to the pursuers, now abroad, is justly indebted and owing to the pursuers the sum of 447*l.* 6*s.* 3*d.* sterling, as the amount of an account to be produced in process, and here held as repeated, *brevitatis causâ*, and annual rent of the said sum from and since the day of ; and, although the pursuers have frequently desired and required the said *James Hunter*, defender, to make payment to them of the foresaid sum of 447*l.* 6*s.* 3*d.* sterling, and annual rent thereof, from the period before-mentioned, yet he refuses, at least delays, so to do. Therefore, the said *James Hunter*, defender, ought and should be decerned and ordained, by the decree of the Lords of the Council and Session, to make

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payment to the pursuers of the said sum of 447*l.* 6*s.* 3*d.* sterling, and annual rent thereof, from and since the said day of , and till payment, together with the sum of 50*l.* sterling, or such other sum as the said Lords shall modify, as the expense of process, besides the fees of extracting the decree to follow hereon, conform to the laws and daily practice of *Scotland* used and observed in the like cases, in all points as is alleged; and anent the charge given in virtue of the foresaid summons (by a messenger at arms, in manner prescribed by law, to the said *James Hunter*, defender, at the market-cross of *Edinburgh*, and pier and shore of *Leith*, as being furth of *Scotland*, at the time), upon the 18th day of *November*, 1801, to have compeared before the said Lords on two certain diets bygone, to have answered at the instance of the pursuers in the said matter, and heard and seen the premises verified and proven, and decreet and sentence given and pronounced therein, conform to the conclusions of the foresaid summons, or else to have alleged a reasonable cause to the contrary, with certification as in the said summons and execution thereof is expressed; the pursuers compearing by Messrs. *H. D. Inglis* and *J. Gordon*, advocates, their procurators, who for them produced in presence of the said Lords, account lybelled on of the contents foresaid; and the defender having been lawfully summoned to this action as aforesaid, and having failed to appear, the foresaid summons, execution thereof, account lybelled on and produced in absence of the defender, and steps of procedure after related, being all at length read, heard, seen, and considered, by the said Lords, and they being therewith well and ripely advised, the Lords of Council and Session decerned and ordained, and hereby decern and ordain the said *James Hunter*, defender, to make payment to the pursuers of the foresaid sum of 447*l.* 6*s.* 3*d.* sterling, and annual rent thereof, from and since the said day of , and till payment,

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together with the sum of 50*l.* sterling, as the expense of process, besides the sum of 1*l.* 0*s.* 0*d.* sterling, being the full dues of extracting this decreet; because, after elapsing of the diets and compearances contained in the aforesaid summons, the same was tabled and called in the Outer House, in common form, and, in respect of the absence of the defender, was appointed to the roll, and being accordingly enrolled in the regulation-roll for the Outer House, by course whereof the same came in and was called on the 25th day of *February*, 1802, the day and date hereof, in presence of Lord *Armadale*, ordinary in the Outer House for the time, when the said Mr. *H. D. Inglis*, for the pursuers, resumed the lybel, and craved decreet in terms thereof; and the defender having not only been lawfully summoned to the action as aforesaid, but also oft and divers times this day publicly called by a macer from the bar, as use is, yet he failed to appear, as was clearly understood by the Lord Ordinary. In respect of all which, his Lordship held the defender as confest on the verity of the lybel, and account lybelled on and produced, and decerned, in absence, in terms of the lybel; and so the said Lords gave and pronounced their decreet and sentence in the said matter, in manner aforesaid, and ordain letters of *horning* on fifteen days' charge, and all other exeolls needful to pass hereon, in form as effeirs. Extracted upon this and the three preceding pages by—

Alexander Menzies."

By the second decree, which was in the same form, *Hunter* was decreed to pay *Smith* 75*l.*, with interest from the day of , besides expense of process, &c.

By a decree of the Court of Session, of the 5th *July*, 1804, that Court adjudged that certain heritable property, to which *Hunter* was entitled in *Scotland*, should belong to *Smith* and his heirs, in payment and satisfaction of the

sum of 75*l.* due to him, with interest from the 11th *June*, 1799; and, by another decree of the same date, the same Court adjudged that certain other heritable property of *Hunter's* should belong to *Stein & Co.* and their heirs, in payment and satisfaction of the sum of 447*l.* 6*s.* 3*d.*, with interest from the said 11th *June*, 1799. In these two last decrees the blanks that were left in the former for the days of payment of interest, were thus filled up. *Hunter* had never had any notice of either of these decrees; but a *Scotch* advocate, who was called as a witness at the trial, proved, that, by the law of *Scotland*, the Court of Session might pronounce judgment against a native *Scotchman*, who had heritable property in that country, for a debt contracted in *Scotland*, although he had no notice of any of the proceedings, and was out of *Scotland* at the time; and that, after such proclamations as were mentioned in these decrees had been made, a person against whom such a decree was pronounced, might, at any time within forty years, dispute the merits of such decree; but that, after the expiration of that period, it was conclusive against him, and all who claimed under him; and that the two last decrees would not operate as a satisfaction of the debts during the period that the debtor had a right to dispute the validity of the first judgments. He also proved, that when decrees adjudged that interest should be paid, but did not shew the time from which it was to run, interest was payable from the time of the citation. In *July*, 1819, the directors of the *East India Company* received a certificated copy of *Hunter's* will, from the registrar of the Supreme Court of Judicature at *Fort William*, in *Bengal;* and in *April*, 1822, one of the assignees of the bankrupts, Messrs. *Stein, Smith, & Co.*, applied to the defendant for the payment of the sums decreed to be due to the bankrupts from *Hunter*, and, on the 12th *July* following, they received the following letter from the defendant:—

"Captain *Forrest* is informed that *Hunter* is dead, and

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that he, Captain *F.*, is the executor; but, yet, Captain *F.* apprehends it would not be proper for him to act until he receives an authenticated will to that effect, to be proved here. Captain *Forrest* will write out to *India* without delay. Of course the assignees will take such steps as they may deem proper under all the circumstances."

For the defendant, it was objected, *first*, that an action of *assumpsit* could not be sustained in this country on the above decrees; as, although *Hunter* was a native of *Scotland*, yet, as the summonses on which the decrees were founded had been executed against him at the Market-cross at *Edinburgh*, and the pier and shore of *Leith*, during his residence in *India*, from which country he never returned, they could not be available against him during his absence, unless it could be shewn that he had had notice of such summonses having been executed; and the cases of *Buchanan* v. *Rucker* (*a*), *Williams* v. Lord *Bagot* (*b*), and *Cavan* v. *Stewart* (*c*), were referred to for the purpose of shewing that a party in this country is not bound by a foreign judgment, or process of an inferior Court, unless he were either actually summoned, or personally served with process: and, *secondly*, that, even if the defendant were bound by the decrees, the plaintiffs were barred by the statute of limitations; and the case of *Murray* v. The *East India Company* (*d*) was relied on: and *lastly*, that, at all events, the plaintiffs could not be entitled to recover interest, as no day was mentioned in the original decrees or decretal orders, from which such interest was to run. A verdict was taken for the plaintiffs, for 862*l.* 16*s.*, being the amount of the two principal sums, with interest from the 11th *June*, 1799. Leave was reserved to the defendant to move to set aside the verdict and enter a nonsuit, or that

(*a*) 1 Camp. 63; *S. C.* 9 East, 192.
(*b*) 3 Barn. & Cress. 772.
(*c*) 1 Stark. N. P. C. 525.
(*d*) 5 Barn. & Ald. 204.

the damages might be reduced to the two principal sums, in case the Court should be of opinion that the above objections, or either of them, were well founded.

Mr. Serjeant *Wilde*, in the last *Michaelmas* Term, accordingly obtained a rule *nisi*. He submitted that there was a fatal variance between the decrees produced in evidence, and those declared on, as it was averred, in every count, that the interest was payable from a certain day; whereas, in the two first decrees blanks were left for the time from which the interest was to run. But the Court held, that there was nothing in that objection, it having been proved at the trial, that, according to the law of *Scotland*, interest was payable from the time of the citation.

Mr. Serjeant *Bosanquet* and Mr. Serjeant *Taddy*, on a former day in this Term, shewed cause. It has been objected, *first*, that the decrees pronounced by the Court of Session, having been made in the absence of *Hunter*, although they might be conformable to the law of *Scotland*, do not confer a ground of action, whereon to raise an *assumpsit* in our Courts. But they cannot be impugned, unless there be something unreasonable on the face of them, or they be contrary to the principles of justice. Besides, *Hunter*, the testator, was a *Scotchman* born, and as such was subject to, and must be bound by, the laws of that country; by which a *Scotchman* who has heritable property in *Scotland* is amenable to the jurisdiction of the Court of Session, and may be cited to an action in that Court, although he be resident abroad; and, if the debtor be *furth* of *Scotland*, judgment may be pronounced against him, after proclamation duly made, at the market-cross at *Edinburgh*, and the pier and shore of *Leith* (*a*). But, as *Hunter's* property

(*a*) See Erskine's Institutes, book 1, tit. 2, s. 11.

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was protected by the law of *Scotland*, so it ought to be subject to his debts; and it is an established and unquestioned rule in that country, that a judgment may be enforced at the suit of a creditor, against his absent debtor, or his representative. The debtor is not precluded from enquiring or examining into the justice of the decree. He may dispute its merits at any time within forty years after it was pronounced. *Hunter*, before he left *Scotland*, not only admitted that the principal sums were due, but no attempt was afterwards made to reduce the decrees. They, therefore, remained in force against him, although they were made during his absence from *Scotland*. It has been said, that such a proceeding is unjust, yet it is not only sanctioned by the law of *Scotland*, but its principle is distinctly recognised by the Legislature. The statute 54 *Geo.* 3, c. 137 (which was passed for rendering the payment of creditors more equal and expeditious in *Scotland*) enacts (*a*), that if a debtor be forth of *Scotland*, he may be cited by affixing copies of the warrant for citing him upon the market-cross of *Edinburgh*, and pier and shore of *Leith*; and if he shall not appear in the Court of Session within the time specified in the warrant of citation, the Court shall award sequestration of the debtor's whole estate and effects, heritable and moveable, real and personal, for the benefit of all his creditors. So, by the 20th section, it is enacted, that estates of partnerships may be sequestrated, and that if their house or shop be shut up or deserted, a copy of the warrant shall be affixed at the market-cross of *Edinburgh*, and pier and shore of *Leith*. The decrees, therefore, are not unreasonable, neither is there any absurdity upon the face of them, nor are they inconsistent with the principles of justice; for, in the case of a foreign attachment, if a plaint be entered in the Mayor's Court of *London*, against *A.*, and the summons or process

(*a*) Section 15.

be returned *nihil*, and thereupon the plaintiff suggest that another person within *London* is indebted to *A.*, the debtor is warned (whence he is called the garnishee), and if he do not deny himself to be indebted to *A.*, the debt is attached in his hands; and if the debtor do not appear within a year and a day to dispute the debt, he is deprived of his property or debt so attached. The authorities which were cited at the trial to shew that this action could not be supported on the decrees, are altogether distinguishable. In *Buchanan* v. *Rucker*, an action was brought on a judgment in the island Court of *Tobago;* and, on its being argued that the presumption was in favour of a foreign judgment, as well as of a judgment obtained in one of the Courts of this country, Lord *Ellenborough* said (*a*): "That may be so, if the judgment appears on the face of it consistent with reason and justice; but it is contrary to the first principles of reason and justice, that, either in civil or criminal proceedings, a man should be condemned before he is heard. To prove the practice, there ought strictly to be some witness professionally acquainted with it;" and here that was done most satisfactorily by the learned *Scotch* advocate, who was called at the trial. In that case Lord *Ellenborough* nonsuited the plaintiff, on the ground that the defendant was not resident within the jurisdiction of the foreign Court; and on a motion to set aside the nonsuit, his Lordship said (*b*), "that there was no foundation for it; that by persons *absent from the island*, must necessarily be understood persons who *have been present* and within the jurisdiction, so as to have been subject to the process of the Court." Here, however, *Hunter* was a *Scotchman* born, and was subject to the jurisdiction of the Court of Session; and unless the decrees are, upon the face of them, contrary to reason or justice, they may be submitted to the jurisdiction of the Courts of this country, by which they may be enforced. So, in *Cavan* v. *Stew-*

(*a*) 1 Camp. 66. (*b*) 9 East, 194.

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art, which was an action of *assumpsit*, on a judgment of the Supreme Court of Judicature in *Jamaica*, Lord *Ellenborough* said (*a*): "It is perfectly clear, on every principle of justice, that you must either prove that the party was summoned, or at least that he was *once* on the island:" thereby recognizing the principle laid down in *Buchanan* v. *Rucker*, *viz.* that a party must have been once in the country, in order to make him an absentee. In *Williams* v. Lord *Bagot*, it was merely held, that a custom, in an inferior Court, to declare against a defendant before the entering of an appearance by him, or by some person for him, was bad in law; and that a custom to issue a summons and attachment at the same time was also bad. There, the Court decided on the mere informality of the proceeding; but here, the law of *Scotland* imposes an obligation on an absent native, who has been once subject to its jurisdiction, and who is summoned according to the law of that country, before a final judgment or decree can be pronounced against him. The case of *Walker* v. *Witter* (*b*), is decisive to shew that an action may be maintained in this country on a foreign judgment, and that the plaintiff need not shew the ground of the judgment.—*Secondly*, as to whether the plaintiffs were barred by the statute of limitations. There is a manifest distinction between the case of an executor and that of an administrator. Although in *Murray* v. The *East India Company*, in an action by an administrator upon bills of exchange payable to the testator, but accepted after his death: it was held, that the statute began to run from the time of granting the letters of administration, and not from the time the bills became due; on the ground that there was no cause of action until there was a party capable of suing; yet here the issue taken on the rejoinder is most material, *viz.* that the plaintiffs did not sue out their writ, and bring their suit thereupon against the defendant, within six years next

(*a*) 1 Stark. N. P. C. 529. (*b*) 1 Dougl. 1.

after he first took upon himself the burthen of the execution of *Hunter's* will in *Great Britain*. The statute, therefore, did not begin to operate as against him, until he had proved the will, or done some act to constitute himself an executor; and on the 12th *July*, 1822, it appears that he had not only not taken out probate, but he stated, by letter, that it would not be proper for him to act until he received an authenticated will to be proved here, and that he would write out to *India* without delay. Although an executor is constituted by, and derives title under, the will, yet the statute clearly does not run as against a demand on him whilst he has the option of renouncing the trust, which he may do at any time before probate, provided he has done no act to bind himself as executor. If a person be sued as executor, he may either plead *ne unques executor*, or deny that he has taken upon himself the burthen of the execution of the will; and he cannot be liable as executor until he has done some act, either by administering or intermeddling with the assets of his testator. In *Wentworth on Executors*, it is said (*a*), "that an executor may well enough be sued for debts of the testator before the will be proved; for he may not by his own act of delaying the probate of the will keep off suits, except he will *refuse* in due manner, that so, administration being granted, there may be somebody suable by the testator's creditors for debts by him owing. And the usual plea of the defendant, to estrange himself from the testament, is, to say, that he neither is executor, nor hath administered as executor; so as if he either be executor *de jure*, or *de facto* by his own act of administering, it sufficeth." In *Toller on Executors*, it is said (*b*), "if there be several executors, they must be all sued, in case they have all administered. But such as have not administered may be omitted; for, although executors themselves must be

(*a*) By Wilson, 37. (*b*) 3d Ed. 471.

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conscious how many are named by the will, and must frame their action accordingly, yet creditors and strangers are bound to take notice of such executors only, as in fact execute the office." They are, therefore, not bound to recognize those executors who have not proved, or taken upon themselves the burthen of the execution of the will. So, in *Wentworth on Executors*, it is said (*a*): "There may be some difference between suits *by* executors, and suits *against* executors; for, when they themselves sue, they, being privy to the will, and having the custody of it, must bring their action in the name of all the executors according to the will; but he that is to bring an action against them, need not, perhaps, take notice of more executors than those that have proved the will, or otherwise do administer." Although, therefore, an executor may be sued before he proves the will, yet he must either have administered, or done some act to render himself liable as an executor; and he may except himself by pleading, that he was never executor, and that he had not administered as such. In *Jolliffe* v. *Pitt* (*b*), it was decided, that, if there be no executor, the statute will not run till administration is taken out; and the Court there agreed that it was expressly excepted out of the statute when the party who has a right of action is beyond sea; nor can laches be attributed to him for not suing, while there was no executor against whom he could bring his action. In *Swallow* v. *Emberson* (*c*), where an executor pleaded that his co-executor was not named, but did not aver that he had administered, the plea was held ill; as, when an executor is sued, if he plead another not named, he ought to go further, and say that he has administered; for that lies in his own cognizance. With respect to the last objection as to the reduction of damages, *viz.* that the plaintiffs could not be entitled to recover interest, as blanks

(*a*) Page 42. (*b*) 2 Vern. 695. (*c*) 1 Lev. 161.

were left in the two first decrees, for the day from which the payment of interest was to commence; yet, as it was proved at the trial, that when decrees adjudging that interest should be paid, did not shew the time from which it was to run, interest was payable from the time of the citation, the objection is answered. At all events, as the days from which the interest was to be payable were inserted, and the blanks filled up, in the two final decrees, it is conclusive; and, as the dates from which the interest was to be paid have been varied in the different counts of the declaration, the plaintiffs are entitled to recover. The case of *Arnott* v. *Redfern* (*a*) is also an authority to prove that interest may be recovered on a *Scotch* judgment; and that, unless the contrary be shewn, the courts in this country will presume that the decision of the Court in *Scotland* was consonant to the justice of the case.

Mr. Serjeant *Wilde*, in support of his rule.—This action cannot be supported on principle. *Hunter* was not in *Scotland* at the time any of the proceedings were had against him, or the decrees pronounced. He had left that country for *India* in 1799, and never intended to return; nor did he know that he had any heritable or other property in *Scotland*, previously to his death, in *India*, in 1817. Although it has been said, that he owed allegiance to the country which gave him birth, and that he must be governed by its laws; still the only question here is, whether the proceedings which were taken against him in his absence, and without any notice, can be adopted or recognized by a court of law in this country. A judgment of a foreign Court may be the foundation of an action here, on the ground that the law will imply a promise by the debtor to pay the debt adjudged to be due to his creditor, but such judgment is only *primâ facie* evidence of a debt;

(*a*) 3 Bing. 353.

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and it is competent to a party sued thereon, to shew that it has been irregularly or unduly obtained. But the law will not always imply a promise; and here the first decrees were against the person, and not the property of the debtor. The Court of Session not only decided in his absence, but without giving him any notice or intimation of the proceedings adopted against him. It was, therefore, contrary to every principle of justice. The decrees, too, are unreasonable upon the face of them, and were irregularly obtained. The party summoned was never before the Court, and therefore the decrees could not operate against him, as he was entirely out of its jurisdiction, having quitted the country more than three years before the proceedings were instituted against him; and, when he quitted *Scotland*, it is quite clear that he never intended to return. If a creditor convey heritable property in *Scotland* to his debtor, without his knowledge, and sue him, and obtain a decree during his absence from that country, he may proceed against him upon such decree in our Courts, to recover any amount. In order to give the Court of Session jurisdiction, it must be shewn that the party proceeded against knew that he had heritable property in that country; and the mere circumstance of his being born there cannot confer such a jurisdiction. In justice, both parties, *viz.* the complainant and the person complained against, should have an opportunity of being heard before any final adjudication was made; but here, the Court of Session proceeded entirely on an *ex parte* statement. In *Buchanan* v. *Rucker*, where it was argued that the presumption was in favour of a foreign judgment, Lord *Ellenborough* said (*a*): "That may be so, if the judgment appears on the face of it consistent with reason and justice; but it is contrary to the first principles of reason and justice, that either in civil or criminal proceedings, a man

(*a*) 1 Camp. 66.

should be condemned before he is heard. If the practice were proved, it is *mala praxis*, and cannot be sanctioned. If a judgment could thus be recovered against any one behind his back, a man would have nothing more to do but go to *Tobago*, there sue us to any amount, and then return to this country to put his judgments in force against us. But the practice contended for is opposite to right reason, and shall not prevail." That is expressly applicable to this case; and, although it has been said, that the proceedings in *Scotland* may be assimilated to the process of foreign attachments in the city of *London*; yet, the latter process affects only the goods, and not the person of the debtor; and in *Fisher* v. *Lane*, Lord Chief Justice *De Grey* said (*a*): "The great objection is, that no notice has been given to the original defendant. Customs of particular cities may deviate from the course of the common law, but a custom contrary to the first principles of justice can never be good; so, this custom, not to summon or give notice to a defendant in a suit commenced against him, is contrary to the first principles of justice; and in my opinion, as at present advised, cannot be good." So, here, although, the Court in *Scotland* might have a right to exercise its jurisdiction against a native of that country in his absence; yet, if proceedings be had against him without notice, it is contrary to justice, and it is absurd to suppose that the merely winding a horn and summoning the party at the market-cross at *Edinburgh*, and pier and shore of *Leith*, can be deemed equivalent to notice. In *Williams* v. Lord *Bagot*, Mr. Justice *Bayley* said (*b*): "This was an action in a Court of record, and a final judgment there is conclusive against all parties and privies; and it is contrary to common justice that a party should be concluded unheard. It seems to me to be a

(*a*) 3 Wils. 302. (*b*) 3 Barn. & Cress. 786.

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fatal objection that the plaintiff declared in the absence of the defendant, and that final judgment was given against the latter, although he had never appeared." Here, it did not appear that the defendant's testator ever knew that he had any heritable or other property in *Scotland*, after he quitted it, to the day of his death; and, if so, his executor cannot be bound by a decree or judgment pronounced in his absence, and without his knowledge.

Secondly, the statute of limitations is a bar to the plaintiff's right to recover in this action. An executor takes the property of his testator by the will under which he is nominated and appointed executor, and not from the time of probate; and, although he may renounce, or cease to be executor, yet, if he intermeddle with the property of the testator, whether he were named in the will as executor or not, he is liable to an action. Here, however, the defendant was duly constituted the executor of *Hunter*. In *Plowden* (*a*), it is said, that when a man makes a will, he thereby commits all his goods to his executors, and the executors who are named shall be called executors before the probate of the will; for the probate is but a confirmation and allowance of that which the testator has done; and by the death, the property of the goods which was in the testator, is cast upon and vested in the executors; and they may execute before probate, and may be sued; and they may alien or give away the goods, or otherwise dispose of them before probate. In *Wentworth on Executors* (*b*), it is said, that "when an executor has once intermeddled he cannot be suffered to refuse, and if he take goods of the testator and convert them to his own use, it is an administration; yea, if he did but take them into his own hands, say some, without converting of them. If one deliver money of the testator for fees about proving the

(*a*) Page 280. (*b*) Page 41.

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will, it is a full and clear administration as executor." In *Comyns's* Digest (*a*) it is said, that the property of the goods is vested in the executor before probate, and he may either administer them, or give and alienate them; and in *Broker* v. *Charter* (*b*), it was held, that executors cannot refuse for one time, but for ever; but they may pray time to advise of taking upon them the executorship; and in *Comyns's* Digest (*c*), it is said, that, after administration, an executor cannot refuse. So in *Wentworth on Executors* (*d*), it is said, that "an executor by administering hath determined his election, and accepted the office of executorship. Besides, creditors may maintain their suits against him having once administered; the common plea to free himself, and to shew that he is not the party suable for the testator's debt, being, that he neither is executor *nor ever did administer* as executor; wherefore, he having administered, it will be found against him." So, in *Toller on Executors* (*e*) it is said, that, if an executor has elected to administer, he may, before probate, be sued at law or in equity by the deceased's creditors, whose rights shall not be impeded by his delay, and to whom, as executor *de jure*, or *de facto*, he has made himself responsible." It is clear, therefore, that an executor who elects to act as such, may be sued before he takes out probate, and it will be no plea for him to say that he has not administered, he must allege also that he never was appointed executor. In *Roberts on Wills*, it is said (*f*), the appointment of an executor is grounded on the will, and he may be constructively appointed by any words denoting the testator's intention to invest him with the character, and he cannot renounce the office by a mere verbal declaration, for his renunciation must be entered and recorded in the Spiritual Court, before the Ordinary; nor can he renounce after he

(*a*) Tit. "Administration," (B 9).
(*b*) Cro. Eliz. 92.
(*c*) Tit. "Administration," (B 4).
(*d*) Page 40.
(*e*) 3d Edit. 48.
(*f*) 3 Ed. Vol. 2, 170.

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has once administered. Although the time from which the payment of interest was to accrue, might be the date of the citation; yet, as the bankrupts had made their election and obtained final decrees against the heritable property of *Hunter, in payment and satisfaction* of their debts, the plaintiffs cannot be entitled to interest which might accrue from the time of the citation to the day the decrees were pronounced.

Cur. adv. vult.

Lord Chief Justice BEST now delivered the judgment of the Court as follows:—

This was an action brought by the assignees of *Stein & Co.*, bankrupts, against the executor of the will of *James Hunter*. On the 31st *May*, 1799, the testator acknowledged himself to be indebted to *Stein & Co.* in the sum of 447*l.* 6*s.* 3*d.*, and, on the 11th *June* in the same year, he acknowledged that he owed 75*l.* to *Robert Smith*, one of the bankrupts, and one of the firm of *Stein & Co.* These debts were contracted in *Scotland*, of which country the deceased was a native, and in which he had a freehold estate. Shortly after the year 1799, the deceased went to *India*. He died in *India*, in 1817, having never revisited *Scotland*. On the 25th *February*, 1802, two decrees were pronounced in the Court of Session in *Scotland* against the deceased, one at the instance of *Stein & Co.*, and the other at the instance of *Robert Smith*. In the first of these, the deceased was ordered to pay to *Stein & Co.*, 447*l.* 6*s.* 3*d.*, with interest from the day of , besides expenses of process, &c. In the second decree, the deceased was ordered to pay to *Robert Smith* the sum of 75*l.*, with interest from the day of besides expenses of process, &c. It appeared from these decrees, that the deceased was out of *Scotland* at the time that the proceedings were instituted in these causes. He never had any notice of these proceedings. The decrees

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stated that the deceased had been, according to the law of *Scotland*, summoned at the market-cross at *Edinburgh*, and at the pier and shore of *Leith*. A *Scotch* advocate proved, that, by the law of *Scotland*, the Court of Session might pronounce judgment against a native *Scotchman*, who had freehold property in *Scotland*, for a debt contracted in that country (although the debtor had no notice of any of the proceedings, and was out of *Scotland* at the time), after such proclamations as were mentioned in these decrees had been made. The same witness proved, that a person against whom such a decree was pronounced, might, at any time within *forty* years, dispute the merits of such decree; but that, after the expiration of *forty* years, it was conclusive against him, and all who claimed under him.

By a decree of the Court of Session of the date of the 5th *July*, 1804, that Court adjudged that certain property which the deceased possessed, in *Scotland*, should *belong* to *Robert Smith*, and his heirs, *in payment and satisfaction* of the sum of 75*l.* with interest *from the* 11th *June*, 1799. By another decree of the same date, the Court of Session adjudged, that certain other property of the deceased, in *Scotland*, should *belong* to *Stein & Co.*, and their heirs, *in payment and satisfaction* of the sum of 447*l.* 6*s.* 3*d.*, with interest *from the* 11th *June*, 1799. The two last decrees fill up the blanks left in the two first decrees, by fixing the term from which interest was to be payable on the debts; *viz.*, from the 11th *June*, 1799; and if the plaintiffs can maintain their action, it will entitle them to a verdict for the sum of 862*l.* 16*s.*

The terms in which the two last decrees are expressed, seem to import that the lands adjudged to *Stein & Co.*, and to *Smith*, were given to, and accepted by, them in satisfaction of their debts. But this cannot be the true construction of these decrees, since none of the decrees are conclusive against the deceased, and those who claim under him,

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until the expiration of *forty* years from the time of pronouncing the two first decrees. The advocate who was examined in the cause, proved, that, by the law of *Scotland*, these decrees would not operate as satisfaction of the debts, during the period that the debtor had a right to dispute the validity of the first judgments. A *Scotch* statute which we have looked into, shews the accuracy of the opinion given to us on the *Scotch* law by the learned advocate; and I feel it due to him to say, that, from the manner in which he gave his evidence, and the clearness and precision with which he explained the grounds of his opinion, I have no doubt that he is extremely well acquainted with the *Scotch* law, and that we may safely rely on every part of his evidence. The two last decrees fixing that interest was to run from 1799; and the testimony of the learned advocate—who proved, that, when decrees adjudged that interest should be paid, but did not fix the time from which it was to run, then interest was payable from the time of the citation—disposes of the objection that no interest could be recovered upon these decrees. The plaintiffs rested their claim on these decrees. The defendant insisted, that the decrees would not support an action in our Courts, because they were repugnant to the principles of justice, having been pronounced whilst the deceased was at a great distance from *Scotland*, and without any notice given to him that any proceedings were instituted against him. This defence was made on the general issue. The defendants also pleaded, that the plaintiffs' causes of action did not accrue within six years before the commencement of the suit. To this there was a replication, that the deceased, at the time when the causes of action accrued, was beyond seas, and remained beyond the seas until the year 1817, when he died; and that the plaintiffs sued out their writ against the defendant within six years after he first took upon himself the burthen of the execution of the will of the deceased in *Great*

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Britain; and that, since the death of the deceased, there had been no other executor in *Great Britain*. This replication was fully proved; and therefore the issue taken on it was properly found for the plaintiffs. The questions to be decided are—*First*, Whether an action can be maintained in *England*, on these judgments of the Court of Session in *Scotland*.—*Secondly*, Whether this replication is an answer to the plea of the statute of limitations. On the first question, we agree with the defendant's counsel, that, if the decrees are repugnant to the principles of universal justice, this Court ought not to give effect to them. But we think that these decrees are perfectly consistent with the principles of justice. If we held that they were not consistent with the principles of justice, we should condemn the proceedings of some of our own Courts. If a debt be contracted within the city of *London*, and the creditor issue a summons against the debtor, *to which a return is made, that the debtor hath nothing within the city by which he may be summoned*, or, in plainer words, hath nothing by the seisure of which his appearance may be enforced, goods belonging to the debtor in the hands of a third person, or money due from a third person to the debtor, may be attached; and, unless the debtor appears within a *year and a day*, and disputes his debt, he is for ever deprived of his property, or the debt due to him. In such cases, the defendant may be in the *East Indies*, whilst proceedings are going on against him in the Court in *London*, and he may not know that any such proceedings are instituted. Instead of the forty years given by the *Scotch* law, he has only one year given to him to appear and prevent a decision that finally transfers from him his property. Lord Chief Justice *De Grey* thought this custom of foreign attachment was an unreasonable one. But it has existed from the earliest times, in *London*, and in other towns in *England*, and in many of our colonies from their first establishment. Lord Chief

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Justice *De Grey*, and the Court of *Common Pleas*, after much consideration, decided against the validity of the attachment, according to the report in *Wilson* (*a*), because the party objecting to it *had never been summoned, nor had notice.* The report of the same case in *Blackstone* (*b*), shews that the Court did not think a personal summons necessary, or any summons that could convey any information to the person summoned, but *a summons with a return of nihil*;—that is, such a summons as I have mentioned, *viz.* one that shews that the debtor is not within the city, and has nothing there, by the seizing of which he may be compelled to appear. The statute 54 *Geo.* 3, c. 137, not only recognizes the practice on which these decrees are founded, as being according to the law of *Scotland;* but enacts, that, on notices being given, at the market-cross at *Edinburgh*, and on the pier and shore of *Leith*, to debtors out of the kingdom, in default of their appearance, their creditors may issue a sequestration against their effects. Can we say that a practice which the Legislature of the United Kingdom has recognized, and extended to other cases, is contrary to the principles of justice? A natural-born subject of any country, quitting that country, but leaving property under the protection of its laws, even during his absence owes obedience to those laws, particularly when they enforce a moral obligation. The deceased, before he left his native country, acknowledged under his hand that he owed the debts. He was under a moral obligation to discharge those debts, as soon as he could. It must be taken for granted, from there being no plea of *plene administravit*, that the deceased had the means of paying what was due to the bankrupts. The law of *Scotland* has only enforced the performance of a moral obligation, by making his executor pay what he admitted to be due, with interest during

(*a*) Vol. 3, p. 297. (*b*) 2 Sir W. Blac. 834.

the term that he deprived his creditors of their just debts. The reasoning of Lord *Ellenborough*, in the case of *Buchanan* v. *Rucker* (*a*), is in favour of these decrees. Speaking of a case decided by Lord *Kenyon*, his Lordship says (*b*): "In that case, the defendant had property in the island, and might be considered as *virtually present*." The Court decided against the validity of the attachment, because it did not appear that the party attached ever was in the island, or had any property in it. In both these respects, that case is unlike the present. In the case of *Cavan* v. *Stewart*, Lord *Ellenborough* said (*c*):—"You must prove that the party was summoned, or, *at least, that he was once* on the island of *Jamaica*, where the attachment issued." To be sure, if attachments, issued against persons who never were within the jurisdiction of the Courts issuing them, could be supported and enforced in the country in which the person attached resides, the Legislature of any country might authorize their Courts to decide on the rights of the parties who owed no allegiance to the government of such country, and were under no obligation to attend its Courts, or obey its laws. We confine our judgment to a case where the party owed allegiance to the country in which the judgments are given against him, from being born in it, and by the laws of which country his property was, at the time these judgments were given, protected; and where the debts were contracted in the country in which the judgments were given, whilst the debtor resided in it. The only other case that has been mentioned, is that of *Williams* v. Lord *Bagot*. In that case, a summons to appear, and an attachment to compel appearance, issued at the same time, and were returnable at the same time. These proceedings were not only contrary to justice, but contrary to our law; and the Court from which the proceedings issued, was governed by *English* law.

(*a*) 1 Camp. 63; *S. C.* 9 East, 192. (*b*) 1 Camp. 66. (*c*) 1 Stark. 530.

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Upon the *second* question, we are of opinion that the replication is an answer to the plea of the statute of limitations. The words of the 21 *James* 1, c. 16, s. 3, are, that "the action shall be brought within six years next after the cause of such action or suit, and not after." Although the injury of which the plaintiffs complain has existed more than six years, yet they had no cause of action until there was some person within the realm against whom the action could be brought. Cause of action is the right to prosecute an action with effect. No one has a complete cause of action until there is somebody that he can sue. The deceased was never in *England* after the cause of action accrued against him. After his death, there was no person in *England* against whom the plaintiffs could proceed, until the defendant took upon himself the execution of his will. The defendant did not act as executor, or prove the will of the deceased, until 1824. An executor may do many acts before he has proved the will; and, when he has proved the will, his right to the testator's property has relation to the time of the testator's death. But we do not think that any action can be maintained against him as executor, until he has taken upon himself to act as such, or has proved the will. One who is appointed an executor may renounce. It would be injustice to allow actions to be brought against one appointed executor, who never meant to *act* as such, before he had an opportunity of renouncing. If he be liable to actions before he has acted as executor, or proved the will, his liability must arise on the instant of the death of the testator; and many actions might be brought against him before he could renounce; and from these actions he could not be relieved without expense and trouble. All that the passages in *Plowden* (*a*), and *Comyns's Digest* (*b*), to which we were referred, prove, is, that an exe-

(*a*) Page 280. (*b*) Tit. "Administration," (B 9).

cutor may be sued before he has proved the will. If he has acted as executor, he may be sued as executor, whether he has proved the will or not. In the present case, the defendant had not acted before 1824, when he obtained probate. In *Rawlinson* v. *Shaw* (*a*), it was determined, that, if a debtor make his creditor one of his executors, the creditor, not having proved the will, or acted in its execution, may sue the other executor for his debt. A man cannot sue as plaintiff, who might be sued as defendant. In *Joliffe* v. *Pitt* (*b*), it is stated by the reporter to have been agreed that no *laches* can be attributed to a man for not suing, whilst there was no executor against whom he could bring his action. I presume, that this point was agreed to by the counsel for all the parties. The report then states, that the Chancellor "inclined to be of opinion that the statute of limitations was not to take place." This point, however, was not decided by the Court. In *Webster* v. *Webster* (*c*), it appeared that the testator died in 1786. The will was proved in 1802. The Lord Chancellor said, that, as there was no representative until 1802, there was no person who could be sued; and therefore the statute could not be pleaded. His Lordship's attention was afterwards called to an allegation on the bill, which shewed that the executor had taken possession of the testator's property in 1792, upon which he allowed the plea of the statute of limitations, and said, that there was not only a cause of action, but *an opportunity of suing*, in 1792. This decision is an authority in point to shew that the statute only runs from the time that an executor has either acted or proved the will. The replication in this case is a good answer to the plea. The *postea* must be delivered to the plaintiffs, and the verdict entered for them for eight hundred and sixty-two pounds, sixteen shillings.

Postea to the plaintiffs.

(*a*) 3 Term Rep. 557. (*b*) 2 Vern. 694. (*c*) 10 Ves. 93.

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Tuesday, May 13th.

The defendant, as surety for one *Æ. M.*, entered into a bond for the performance of an award, on which he was sued by the plaintiff, and the payment of which he resisted, and instituted proceedings to set it aside. Pending these suits, the plaintiff advertised the bond for sale as a common money bond; whereupon the defendant wrote to the auctioneer, apprising him of the circumstances under which the bond was given, and saying that it was of no value, and averring, that the object of the plaintiff in putting it up to sale was, "either to extract money from the pocket of an unwary purchaser, or, by the threat of publication, to extort money from *him*." The defendant publicly read and circulated the letter in the sale-room:—*Held*, libellous, without proof of *express malice*.

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THIS was an action for a libel. The declaration stated —That, before the time of committing the grievances by the defendant thereinafter mentioned, to wit, on the 17th *July*, 1823, at *London*, the defendant made his certain bond or writing obligatory, sealed with his seal, and thereby acknowledged himself to be held and firmly bound to the plaintiff and one *William Roberts*, in the sum of 1000*l*. That the plaintiff was desirous of selling, as far as he lawfully might, his interest in the said bond or writing obligatory, by public auction, and, for that purpose, he, before and at the time of committing the said grievances, to wit, on the 30th *April*, 1827, at *London*, caused the said bond or writing obligatory, and his said interest therein, to be, and the same then and there were put up to sale by public auction, by one *Charles Launcelot Hoggart*, as the auctioneer and agent of the plaintiff, in order that the same might be then and there sold for the plaintiff;—yet the defendant, well knowing &c., and contriving &c., to injure the plaintiff in his good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, with and amongst all his neighbours, and other good and worthy subjects of this kingdom, and to cause it to be suspected and believed by those neighbours and subjects, that he, the plaintiff, had been and was guilty of the offences and misconduct thereinafter mentioned to have been charged upon and imputed to the plaintiff, and to cause it to be suspected and believed that he had no interest in the said bond or writing obligatory, and that nothing was due and owing thereon from the defendant to the plaintiff, and that the same was of no value; and to hinder and prevent the plaintiff from selling and disposing of the said bond or writing obligatory, and of his

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said interest therein, and to cause and procure the plaintiff to sustain and be put to divers great expenses attending the said exposure to sale, and to vex, harass, oppress, impoverish, and totally ruin him, the plaintiff;—theretofore, and upon the said exposure to sale of the said bond or writing obligatory, and of the plaintiff's interest therein, and before the said bond and the plaintiff's interest therein had been sold or disposed of, to wit, on &c., last aforesaid, at *London*, falsely, maliciously, and injuriously, composed, printed, and published, and caused to be composed, printed, and published, a certain false, scandalous, malicious, and defamatory libel, of and concerning the plaintiff, and of and concerning the said bond or writing obligatory, and the said exposure to sale by the plaintiff; in which said libel was and is contained the false, scandalous, defamatory, and libellous matter following, that is to say:—

"The 1000*l.* bond, advertised for sale by Mr. *Hoggart* of *Broad Street.*

"The above is advertised as if it were a money bond of a responsible gentleman; and how Mr. *Hoggart* can reconcile it with his character to suppress the facts, with which he was perfectly acquainted, is for him to explain. The short circumstances are these:—Mr. *Æneas Morrison*, of *Glasgow*, now deceased, and *John Robertson*, of *London*, recently a bankrupt, had occasion to refer to arbitration certain disputed accounts; each party procured a friend to enter into a surety bond in 1000*l.*, for the due performance of the award to be made. Pending the arbitration, Mr. *Morrison* died, and intimation was given that the surety considered himself discharged. Mr. *Robertson*, however, forced the matter to proceed, and the arbitrators having differed, he procured from an umpire an award in his own favour. Proceedings have been instituted in equity in this country, and also in *Scotland*, to set aside this award, and of course to have delivered up to be cancelled the bond of the surety for the performance of

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it. This is the very bond now offered for sale! The following letter will shew that Mr. *Hoggart* was perfectly aware of the circumstances previously to advertising it."

"11th *April*, 1827.

"Sir,—I have to acknowledge the receipt of your favour of this date, and have to thank you for the courtesy of the communication. I have no doubt you know me well enough to be assured, that, if I owed to Mr. *Robertson* any money on bond, there would be no occasion for him to resort to the wicked expedient he is now attempting. His object is, either to extract money out of the pocket of an unwary purchaser, or, what is more likely, by means of this threat of publication, to extort money from me.

"That the bond is not worth one farthing, is clear to demonstration; and, as there is an existing suit in equity to set it aside, I imagine you will not think you acquit yourself properly to the public, without you add to the advertisement for the sale, that there is a suit in dependence. You ask me whether I would choose that the bond should go into the market. I have no means of preventing your carrying into the market an article of no value; but, if, by your putting to me the above question, you mean that I should offer to become the purchaser, I have only to add, that, if you were to offer it to me for 10*l*., I should hesitate about accepting the offer. I am, &c. *Alexander Macdougall.*"

Whereby, and by reason of the premises, the plaintiff had been greatly injured in his good name, fame, and credit, and brought into public scandal, infamy, and disgrace amongst his neighbours, and other good and worthy subjects, many of whom suspected and believed, and still do suspect and believe, the plaintiff to have been, and to be, guilty of the said offences and misconduct, and have, by reason of the committing of the said

grievances by the defendant as aforesaid, from thence hitherto wholly refused, and still do refuse, to have any transaction, acquaintance, or discourse with the plaintiff, as they before were used and accustomed to have, and otherwise would have had; and also, by reason thereof, divers of the liege subjects of our lord the king, who were present at and upon the said exposure to sale, and who were then and there about to be and become purchasers of the said bond, and of the plaintiff's interest therein, and who might and would otherwise have bid for and purchased the same, were then and there prevented from bidding for, and becoming the purchasers of, the said bond, and of the plaintiff's interest, and then and there, and from thence hitherto, have respectively wholly declined to purchase the same; and thereby the plaintiff was then and there hindered and prevented from selling and disposing of the said bond, and of his said interest therein, and had thereby not only lost and been deprived of all the advantages and emoluments which he might and would have derived and acquired from the sale thereof, but had been forced and obliged to pay, lay out, and expend, divers large sums of money, amounting in the whole to a large sum, to wit, the sum of 50*l.*, in and about the said exposure to sale, and expenses incident thereto, to wit, at *London*: and the plaintiff had been and was, by means of the premises, otherwise greatly injured.

The defendant pleaded the general issue, and also several special pleas of justification, which it is unnecessary to set out, as no evidence was offered in their support.

. . . . . .

At the trial, before Mr. Justice *Gazelee*, at *Guildhall*, at the adjourned Sittings after the last *Michaelmas* Term, it appeared that the defendant, as surety for one *Æneas Morrison*, had entered into a bond for the performance of an award to be made in pursuance of a submission to arbitration of all matters in dispute between *Morrison* and the plaintiff; that the deed con-

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tained a proviso that the submission should not vacate or expire through the decease of either of the parties; that *Morrison* died pending the submission, and shortly afterwards the defendant gave the plaintiff's agent notice that he considered himself discharged from his liability as surety on the bond. The arbitrator, however, proceeded to act on the submission, and nearly a year afterwards published his award, by which he directed the executors of *Morrison* to pay a certain sum to the plaintiff; and, they having no assets, the plaintiff sued the defendant in the Court of King's Bench, as surety on the bond, and obtained judgment. The defendant afterwards brought a writ of error in the *Exchequer Chamber* (*a*), and filed a bill in equity to restrain the plaintiff from proceeding on the bond, and also instituted proceedings in *Scotland* for the same purpose; and, *pending these proceedings*, the plaintiff applied to Mr. *Hoggart*, an auctioneer, to put up the bond to public sale. Mr. *Hoggart* accordingly wrote to the defendant to apprise him of the intended sale, when he sent him the letter of the 11th *April*, as set out in the declaration. On the day of sale, the defendant caused a printed paper, containing the libel declared on, to be circulated in the sale-room. It also appeared, that in consequence of the defendant's having refused to accede to certain terms of negotiation, the plaintiff had said, "I will advertise the bond, and he shall see the advertisement under his nose at his breakfast-table;" and the following advertisement shortly afterwards appeared in the *Times* newspaper: "The bond of *Alexander Macdougall* Esq., Solicitor. On &c., at &c., by Mr. *Hoggart*. The bond of the above responsible gentleman, for 1000*l.*, on which the judgment of the Court of King's Bench has been obtained, but payment of which may be put off by Mr. *Macdougall* for about twelve months longer, &c. &c."— For the plaintiff, it was insisted, that as the defendant, in

(*a*) *Vide, ante*, 147.

his letter to *Hoggart*, had said, that the plaintiff had resorted to a wicked expedient, and that his object was either to extract money out of the pocket of an unwary purchaser, or, by means of the threat of publication, to extort money from the defendant; it was a personal slander on the plaintiff, for which he was entitled to recover. The learned Judge left it to the Jury to say, whether, under all the circumstances, the defendant was acting *bonâ fide* in supporting his title to the bond; and whether the objectionable remarks in the letter to *Hoggart* exceeded the bounds of moderation only from a warmth of feeling; or whether the defendant went out of his way for the purpose of slandering the plaintiff, or unfairly attacking his character. The Jury gave a verdict for the defendant on the general issue, and were discharged from any finding on the special pleas.

Mr. Serjeant *Spankie*, in the last Term, obtained a rule *nisi*, that this verdict might be set aside, and a new trial granted, on the ground that the plaintiff was entitled to recover for the attack made upon his character by the defendant. He submitted, that, although the letter written by the defendant to *Hoggart* might be considered in the nature of a confidential or privileged communication, as far as it related to the plaintiff's interest in or title to the bond; yet it could not justify slander of the person. If a man mix up the assertion of his claim with personal invective, the law will not protect him; and, although the defendant might have been warranted in using strong language with regard to the bond, yet he was not justified in insinuating that the plaintiff was a swindler, which he did in terms, as he stated that his object was, either to extract money from the pocket of an unwary purchaser, or to extort it from the defendant by means of threat. If a party assert an interest in an estate offered for sale, he may dispute the title of the party exposing it; but he cannot impute corrupt

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motives to the seller, or load him with personal invective; and here the attack by the defendant on the plaintiff was not only unnecessary, but was wholly unconnected with the subject of the bond.

Mr. Serjeant *Wilde* now shewed cause. The *gravamen* of the plaintiff's charge is not the personal slander, or the defamation of his character; but, that persons who attended at the sale, and would have bid for the bond, were deterred from so doing; by means of which the plaintiff was prevented from disposing of the bond, and was obliged to pay a certain sum for the expenses of exposing it to sale; and the substance of the whole of the charge in the declaration is, the impeding the plaintiff in the sale of that instrument. The defendant had, under the circumstances, an unquestionable right to reflect on the conduct of the plaintiff, as far as it regarded the sale of the bond. In order to render a party claiming title or interest in land or other property, liable in damages for the publication of a libel, or for oral slander concerning it, it must be shewn that the libel was published, or the words spoken, with a malicious intent; and, although malice may be inferred from the nature of the publication, yet the law will presume its absence in the first instance. The law, however, will not justify personal slander; but, if there be no evidence of express malice, the Court will look at the occasion which gave birth to the libel or the defamatory words; and, although a party may not be excused for uttering slanderous matter, yet the occasion may justify it, unless he has been guilty of an excess, or it be shewn that he was actuated by express malice. The benefit of this presumption is not confined to those who claim an interest, but extends to persons who act in a friendly character, or in the course of a professional duty; as well as to those who appear to act in the discharge of any duty which the convenience or exigencies of society may call upon them to perform; as in the case of a

master giving a character of a servant, which must be inferred to be *bonâ fide*, until a malicious intention be proved: and here, the only question is, whether the statement published by the defendant was made with a malicious intent or not. In *Hargrave* v. *Le Breton* (*a*), it was held, that there must be malice, either expressed or implied, to maintain an action for slander of title. There, a creditor of a mortgagor sent his attorney to a sale-room where the estate was put up to auction by the plaintiff, the mortgagee, to acquaint the persons present that such mortgagor had become bankrupt before he had mortgaged the estate to the plaintiff; and Lord *Mansfield* said (*b*): "that, under such circumstances, malice could not be implied; and that no action lies for giving a true character of a servant, upon application made to his former master, to inquire into his character, with a view of hiring him; unless there should be extraordinary circumstances of express malice." In *Pitt* v. *Donovan* (*c*), in an action for slander of title, conveyed in a letter to a person about to purchase an estate of the plaintiff, imputing insanity to *J. S.*, from whom the plaintiff purchased it; and that the title would therefore be disputed: the Court held, that the question for the Jury was, not whether they were satisfied that *J. S.* was insane, or that the defendant entertained an opinion that he was so, upon such grounds as would have persuaded a man of sound sense and knowledge of business; but whether he acted *bonâ fide* in the communication which he made, believing it to be true, as he judged according to his own understanding, and under such impressions as his situation and character were likely to beget. And Lord *Ellenborough* there said (*d*): "In the case of slander of title, the *bona fides* of the communication, and not whether a man of rational understanding would

(*a*) 4 Burr. 2422.
(*b*) Id. 2425.
(*c*) 1 Mau. & Selw. 639.
(*d*) Id. 648.

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have done so and so, is the question to be canvassed. A man of intemperate passions, or of weak understanding, or a man acting under an erroneous impression, may be carried further than a man of more mature judgment; but still he would not be liable to an action of slander of this sort." In *Fairman* v. *Ives*, where the defendant, a creditor of an officer in the army, addressed a petition to the Secretary at War, with a view of obtaining, through his interference, the payment of a debt due to him from the plaintiff, Lord Chief Justice *Best* said (*a*): "The letter complained of was addressed to the Secretary at War, and was delivered to him, and to him only, with an intent to prevail on him to exert his authority to compel the plaintiff, an officer in the army, to pay to the defendant a debt. The defendant seems to have felt that the plaintiff had treated him very ill, and the letter contains such expressions as an angry man was likely to use, and such as would have rendered the letter a libel if it had been sent into general circulation, or to any individual without a sufficient cause to justify the sending of it."—Although, therefore, a party may be guilty of an excess by using improper or unguarded expressions in the heat of the moment, he cannot be answerable for them in an action for damages, unless they were uttered with a malicious intent. In *M'Dougall* v. *Claridge* (*b*), in an action for a libel on the plaintiff in his profession of a solicitor, contained in a letter written by the defendant, addressed to third persons, and charging the plaintiff with improper conduct in the management of their concerns; it appearing that the defendant himself was interested in the affairs which he had supposed to have been mis-managed by the plaintiff, Lord *Ellenborough* was of opinion that it could not be considered as a libel, and made the subject of an action for damages. So, in *Dunman* v. *Bigg* (*c*), the plaintiff, a dealer

(*a*) 5 Barn. & Ald. 646. (*b*) 1 Camp. 267. (*c*) Id. 269, n.

in beer, buying it of brewers, and selling it to publicans, being about to open an account with the defendant, a brewer, one *L.* became his surety for the price of such beer as should from time to time be supplied to him, the defendant promising to inform the surety of any default in his payments made by the plaintiff; and after the parties had dealt together for some time, the defendant went to the surety and said, that the plaintiff wished to cheat him, that he had sent back, as unmerchantable, beer which he himself had adulterated, and that he was *a rogue and a rascal;* and there was no evidence that any cause existed to call for such an opprobrious statement, there being only evidence that a sum of money was due from the plaintiff to the defendant for beer: but, as the surety was connected with the transaction, Lord *Ellenborough* was inclined to think that it was a privileged communication, though the defendant seemed to have been betrayed by passion into some unwarrantable expressions. So, here, the defendant's letter to *Hoggart* was in the nature of a confidential communication; and the conduct of the plaintiff in exposing the bond to sale, was calculated to irritate the defendant, and more particularly so, as it had been so long a subject of litigation between them. The plaintiff, in his advertisement, had stated it to be a bond of an attorney, and that he might put off its payment for twelve months. That was an unwarrantable reflection on the defendant's professional character, and likely to excite or irritate him, especially when added to the expression made use of by the plaintiff, that he would advertise the bond, and that the defendant should see the advertisement under his nose at his breakfast-table. At all events, the question was most properly left to the Jury; and they were fully warranted in negativing that the defendant had been actuated by malice. On the contrary, he published his statement in the sale-room, with a *bonâ fide* view to his own interest in the bond, and to prevent its sale, when he knew that the plaintiff could not

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make a title to it in the terms represented in the advertisement.

Mr. Serjeant *Spankie*, in support of his rule.—The question as to the defendant's intent in publishing the statement in question, or whether it were malicious or not, should have been left generally to the Jury. It has been said, that the plaintiff's charge against the defendant is confined to the single fact of impeding the sale of the bond, and that the defendant was warranted in asserting his right or interest in it, for the purpose of preventing the persons present at the auction from bidding for it. But his principal object was, to cast personal invectives on the character of the plaintiff, and the gist of the action, as set out in the declaration, is, the personal slander, or attack on the plaintiff's character, whereby he was greatly injured in his good name, fame, and credit, and suspected by his neighbours to have been guilty of the misconduct imputed to him. That part of the declaration which related to slander of title, was abandoned at the trial, and the attention of the Court was directed to the personal attack on the plaintiff alone. In *Pitt* v. *Donovan*, there was no charge of personal slander, but the letter related solely to the sale of the estate. Besides, there, it was sent privately to the intended purchaser; whilst here, the statement was circulated in the public auction-room. So, the cases of *Hargrave* v. *Le Breton*, and *Smith* v. *Spooner* (*a*), were decided on the sole ground that the actions were founded on a mere slander of title. Here, however, the true question is, whether the defendant, at the time he made his statement in the auction-room, was acting *bonâ fide*, and in the mere support of his title on the bond, so as to raise doubts in the minds of those who might be inclined to bid for it. *Quod necessitas cogit defendit.* Although the defendant was

(*a*) 3 Taunt. 246.

justified in attacking the plaintiff's title, he had no right to mix up with it a slander of his person; and his stating that the plaintiff's object was, either to extract or extort money, could not be justified, nor was it necessary in order to present any objections he might have thought proper to raise to the validity of the bond. The defendant's statement embraced two distinct points, and might have been so left to the Jury, *viz.* the one, whether he went further than was required to prevent the sale of the bond; the other, whether he was justified in making an attack on the personal character of the plaintiff. This case cannot be assimilated to that of *Fairman* v. *Ives*, as there, the defendant acted *bonâ fide*, and under the supposition that the public officer whom he addressed had authority to redress his wrongs. Here, however, the question is, whether the defendant was justified by law in making the statement he did, or whether the occasion required it. The previous provocation by the plaintiff could only be urged in mitigation of damages; and, although, if the defendant had been guilty of an excess in his statement, he might not have been amenable; yet, he was bound to confine himself to the bond, which was the subject of the sale; for, in *Brown* v. *Croome* (*a*), an advertisement in a public paper, strongly reflecting upon the character of an individual who had been declared bankrupt, was held libellous, although published with the avowed intention of convening a meeting of the creditors for the purpose of consulting upon the measures proper to be adopted for their own security, as the legal object might have been attained by means less injurious; and Lord *Ellenborough* there said: "The question is, whether the defendant was justified in publishing this advertisement to the world, when all the communication which was necessary, might have been made in a manner less injurious. In that point of view, and to that extent, I think the publication is

(*a*) 2 Stark. N. P. C. 297.

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libellous:" and his Lordship concluded by saying, that "every unauthorized publication to the detriment of another, was, in point of law, to be considered as malicious." That is the true principle, and it is expressly applicable to this case, as the defendant might have made his statement in more guarded language, and ought not to have gone out of his way to attack the character of the plaintiff.

Lord Chief Justice BEST.—This was an action for a libel. It is most material to state, that the declaration contains a charge against the defendant for a libel, the effect of which is to injure the plaintiff in his personal character; and also a charge for slander of title. The latter charge, however, may be considered as if it were out of the declaration, as it was abandoned by the plaintiff's counsel at the trial. The question then is, whether the count in the declaration is adapted to the charge of personal slander; and whether the libel is such as may have the effect of injuring the plaintiff in his reputation and character; or whether, if it be a libel on his character, the defendant might, under the circumstances, be excused in its publication. If a person, unauthorized, publish that which may be detrimental to the character of another, and an injury thereby result, the law will not enquire into the motives which might induce the party to publish, but will render him answerable in damages to the injured party. But if a man, in the due course or performance of a duty, or for the purpose of protecting his interest, write a paper containing a charge which may be injurious to the character of another, yet, if he act honestly, such an act is excusable. So, although his statement may have been made with some degree of warmth, he may be excused; but he must confine his charge to what the necessity of the occasion may require; and if he go beyond it, he cannot be excused, unless he shew that it was necessary to make such a

charge, for the purpose of protecting his property: but if he unnecessarily or wantonly impute criminal or base motives to the party against whom the charge is made, he must answer for the consequences. What, then, is the nature of the publication of which the plaintiff complains? It is in these terms: "The 1000*l.* bond, advertised for sale, by Mr. *Hoggart*, of *Broad Street*. The above is advertised as if it were a money-bond of a responsible gentleman; and how Mr. *Hoggart* can reconcile it with his character to suppress the facts, with which he was perfectly acquainted, is for him to explain. The short circumstances are these:— Mr. *Æneas Morrison*, of *Glasgow*, now deceased, and *John Robertson*, of *London, recently a bankrupt*"—That was a fact the defendant was authorized in stating, as it applied to the sale of the bond. But he went on; and, after setting out other circumstances, and the proceedings which had been taken on the bond, he concluded with his letter addressed to Mr. *Hoggart* on the 11th *April*, 1827, in which he says, "I have to acknowledge the receipt of your favour of this date, and to thank you for the courtesy of the communication, I have no doubt you know me well enough to be assured, that if I owed to Mr. *Robertson* any money on bond, there would be no occasion for him to resort to the *wicked* expedient he is now attempting." The defendant should have confined himself to the sale of the bond, or to shewing that the plaintiff had no title to sell; but he goes further, and says, "His object is, either to extract money out of the pocket of an unwary purchaser, or, what is more likely, by means of this threat of publication, to extort money from me." Now, there could be no occasion whatever for the defendant to introduce the latter sentence, which was clearly malicious. That, however, must not be considered as malicious in common parlance, but, in the legal acceptation of the word, as mischievous and unjust; and it surely was most unjust and malicious to impute such motives to the plaintiff. On

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that principle, I am of opinion that the Jury were not authorized in finding the verdict they have done; for the defendant could not be excused the publication of these latter words. We have, in the course of the argument, been referred to several cases of slander of title; but they are altogether distinguishable from cases of personal slander; as an action for slander of title cannot be maintained unless special damage be proved. The distinction was most properly drawn by Mr. Justice *Littledale*, in *Watts* v. *Reynolds*(*a*), *viz.* that slander of title is not like a common action of slander, which is maintainable without special damage; but it is founded entirely on the special damage; and he there left it to the Jury to consider, whether the defendant acted *bonâ fide* as attorney for the party who claimed title to certain premises put up to sale, and whether either of them acted unfairly, or without due consideration. If the opinion I expressed in *Fairman* v. *Ives* be looked at, it will support the doctrine to which I now subscribe. In that case, a petition was addressed by the defendant, a creditor of an officer in the army, to the Secretary at War; and it was done *bonâ fide*, as the defendant thought that he had a right to address the Secretary, and that he (the Secretary) had authority to order the payment of a debt due from the officer to him. The declaration charged the defendant with publishing a libel, purporting to be a petition to the Secretary at War, and which was set out as follows:— "Your petitioner solicits your Lordship's well-known justice and disposition to benevolence to be extended towards him, by directing an officer in his Majesty's service, Captain *W. B. Fairman* (the plaintiff), to discharge a debt which has been due to your petitioner above four years; and, although frequently applied for, has never been noticed by Captain *Fairman*, but unjustly and unfairly he has deprived your petitioner of any redress, except through

(*a*) 1 Mood. & Malk. N. P. C. 2.

your Lordship's humane consideration, by giving an address, as will appear by the inclosed, where he had no credit, nor even was known. Your petitioner begs most humbly to inclose copies of two bills of exchange, one for 100*l.*, and the other for 75*l.* 10*s.*, which your petitioner received in payment as money, and, when due, Captain *Fairman* had given no order to pay them, either at his agent's or at the address of his bills, where your petitioner was informed he did not reside; nor did they know any thing about his bills. Since that period, your petitioner has repeatedly written to Captain *Fairman*, who, although he has received the letters, has never noticed them, and has concealed himself from a just and lawful demand. Your petitioner has no other wish in addressing your Lordship, but that your influence may be extended towards him, by ordering Captain *Fairman* to discharge his debt." There was no general abuse or personal invective in this petition, nor any allegation that Captain *Fairman* had attempted to extort money, but only a mere statement of facts; and Lord Chief Justice *Abbott* told the Jury, that, if they thought that the petition contained only a fair and honest statement of facts, according to the understanding of the party who sent it, they ought to find a verdict for the defendant. To that I agree; but that case differs altogether from the present, as here, there was no statement of facts in the defendant's letter to *Hoggart*. In the commencement of it he stated, that the plaintiff's object was, either to extract money from an unwary purchaser, or, what was more likely, by the threat of publication, to extort it from the defendant himself. In *Fairman* v. *Ives*, Lord Chief Justice *Abbott* said (*a*): "I think that it was a good answer to the action, upon the plea of not guilty, for the defendant to shew that the paper in question was addressed to the Se-

(*a*) 5 Barn. & Ald. 644.

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cretary at War, *bonâ fide*, for the purpose of obtaining redress, and not for the purpose of slandering the plaintiff;" and my Brother *Holroyd* and myself founded our opinions on the facts; for he observed, that the question was, whether the publication was not justified by the occasion; and that, the letter having been published for the purpose of obtaining redress, and not for the purpose of slander, the plaintiff was not entitled to recover: and I thought that the circumstances under which the petition was sent, rendered it a privileged communication. Although a party may express himself with warmth in a letter, yet if it be done *bonâ fide*, it will not subject him to an action. But he must not go beyond facts, in order to indulge in an angry feeling, nor impute to another such motives as the occasion does not warrant. In *M'Dougall* v. *Claridge* (*a*), which is a mere *Nisi Prius* case, although there is no doubt but that the report is perfectly correct, the words of the libel are not set out; and it probably did not contain an impassioned statement of facts, as it is said that it merely charged the plaintiff with improper conduct in the management of certain concerns entrusted to him; but the case of *Dunman* v. *Bigg* goes further, as the defendant did not confine himself to the facts, but slandered the plaintiff by calling him a rogue. There, the plaintiff was a dealer in beer, buying it of brewers, and selling it to publicans, and, wishing to open an account with the defendant, a brewer, one *Leigh* became his surety for the price of such beer as should be from time to time supplied to him, the defendant promising to inform *Leigh* of any default in his payments made by the plaintiff. After the parties had dealt together for some time, the defendant went to *Leigh*, and spoke to him in very opprobrious terms of the plaintiff—saying that he wished to cheat him; that he had sent back, as unmerchantable, beer

(*a*) 1 Camp. 267.

which he himself had adulterated; and that he was a rogue and a rascal;—and Lord *Ellenborough* was inclined to think that this was a privileged communication, but that, had the defendant gone to any other man and uttered these words of the plaintiff, they certainly would have been actionable; and he said, that it would be for the Jury to say, whether the expressions were used with a malicious intention of degrading the plaintiff, or with good faith, to communicate to the surety facts which he was interested to know: and the counsel for the parties eventually agreed to withdraw a juror. But, considering that the late Lord Chief Justice *Gibbs* (whilst he was Attorney-General), who was the defendant's counsel, acceded to that proposition, it does not seem that he was confident that it was a privileged communication. We have been referred to the case of *Brown* v. *Croome*, which appears to me to bear expressly on the present, and to be founded on principle. There, the character of a person who had been declared a bankrupt, was reflected on by an attorney, by means of an advertisement in a provincial newspaper; and, on its being contended that it was a privileged communication made by the defendant in the course of his duty as a professional man, at the instance of his client, Lord *Ellenborough* said: "The question is, whether the defendant was justified in publishing the advertisement to the world, when all the communication which was necessary, might have been made in a manner less injurious. A communication sufficient for the purpose might have been made in measured language. The want of proper caution had rendered the publication actionable, as being published to the world at large; this made an essential distinction: in the case of a brief to counsel, for instance, the publication, as between the attorney and the counsel, might not be libellous, and yet, if it were to be printed and published, there might be a libel in

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every line. Every *unauthorised* publication to the detriment of another, was, in point of law, to be considered as malicious." I have only adverted to those cases in order to guard against deciding the present contrary to the principles there laid down. But it appears to me that this case may be decided independently of any authority; for, although a man may express his sentiments freely, in a letter, on a subject in which he is personally interested, and state certain facts relative to such subject—nay, more—may even express himself with warmth, yet he must not go beyond what common honesty requires, and impute criminal intentions to a party, unnecessarily, and unconnected with such facts; and here, it was unnecessary for the defendant to attack the plaintiff's character, or endeavour to criminate him; and although he might have felt himself irritated, it was malicious and unjust to asperse the character of the plaintiff in the manner he did: and, consequently, he was not protected from the consequences of this action; nor can the publication of the letter addressed to *Hoggart* be considered as a privileged communication. I am, therefore, of opinion that the rule for a new trial must be made absolute.

Mr. Justice PARK.—Although I coincide with my Lord Chief Justice in thinking that there must be a new trial in this case, yet I am most anxious not to draw too strict a line with respect to confidential or privileged communications. A Court of law must take care that men do not make or publish statements which may tend to injure the characters of their neighbours. I have no hesitation in saying that I think the Jury have, in this case, come to a wrong conclusion. The libel complained of went far beyond the purposes of the business in hand, *viz.* the sale of the bond in question. I agree, that, if the statement circulated in the sale-room had been confined to the first paragraph, it would fall within the

reasoning and law of the cases to which we have been referred. If, when the plaintiff had publicly advertised and exposed the bond to sale, the defendant had thought that the title was tainted by the proceedings then pending in the Court of Error, as well as in a Court of Equity, he had a clear right to state his objections to the sale of the bond, and might even have used strong language for that purpose; but he has gone much farther than the occasion required. He at first stated that *Morrison* was dead, and that the plaintiff had been recently a bankrupt; that the bond was given for the performance of an award; and that proceedings had been instituted in equity in this country, and also in *Scotland*, to set aside the award. If these facts were true, the defendant had a right to publish them in the auction-room, within the principle laid down by Lord *Mansfield* in *Hargrave* v. *Le Breton* (*a*). There, an attorney to a creditor who had previously committed an act of bankruptcy, stopped the sale of an estate which he had mortgaged and assigned to the plaintiff, by declaring in the auction-room that the creditor had become bankrupt before he made the mortgage to the plaintiff, and that a docket had been made out for a commission; and it turned out that an act of bankruptcy had been committed, but that no commission had been sued out: and it was held, that, in order to support an action of slander of title, there should be proof of malice, either express or implied; that, if the defendant acted *bonâ fide*, and told the truth, he did no more than his duty; and, though he went beyond what was strictly true, still, if there was no material variance, and no difference made with respect to the plaintiff's title, the action was not maintainable. There, however, the attorney was justified in making the declaration he did; for, as Lord *Mansfield* said, "the defendant was called upon, in order to preserve his own interest, and that

(*a*) 4 Burr. 2422.

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of the rest of the creditors, as an honest and a prudent man, to give the notice." Here, however, the defendant's answer to *Hoggart's* communication, that the sale of the bond was about to take place, was not confined to a statement of facts, but commences by way of invective, casting a foul aspersion on the plaintiff's character, viz. "If I (the defendant) owed the plaintiff any money on bond, there would be no occasion for him to resort to the *wicked expedient* he is now attempting. His object is either to extract money out of the pocket of an unwary purchaser, or, what is more likely, by means of this threat of publication, to extort money from me." Now, I cannot conceive that a grosser libel could be fabricated or published of a man in the character of a merchant. The case of *Fairman* v. *Ives* stands upon a wholly different ground. There, the defendant, a creditor of an officer in the army, addressed a petition to the Secretary at War, *bonâ fide*, and with a view of obtaining, through his interference, the payment of a debt due to him. But the defendant mistook his way; for he supposed that the Secretary at War, acting as a public officer, had the means of giving him redress. Besides, the petition was confined to a statement of facts which the creditor believed to be true. Here, however, the defendant went to the auction-mart, and circulated among the persons who were present when the bond was put up for sale, his letter to *Hoggart*, which he had caused to be printed. The defendant might have been warranted in making, and indeed ought to have made, the communication as to the circumstances attending the bond, as set out in the beginning of his statement; but he had no right to go out of his way, and impute extortion to the plaintiff, who did not appear to have previously used any improper or indecorous expression; and although there might have been a previous bickering between him and the defendant, yet it could not be adduced as an answer to the libel; but could only ope-

rate in mitigation of damages. In *M'Dougall* v. *Claridge*, I was counsel for the plaintiff; and the defendant's letter was held to be a privileged communication, as he was writing confidentially to his client, and was also himself interested in the affairs which he supposed to have been mismanaged by the plaintiff; which he had clearly a right to do. And the Attorney-General appologized for the defendant, saying, that he, at the time of writing the letter, was certainly impressed with a belief of the truth of the charge it contained, but had since seen reason to believe it was groundless; and a juror was withdrawn. If the present defendant had adopted that course at *Nisi Prius*, I think he would have acted wisely. However, as he did not do so, it is immaterial to the present question. The case of *Godson* v. *Home* (*a*), appears to me to be precisely in point. There, the plaintiff, an attorney, was employed by *A.*, to bring an action against *B.*, and the defendant was commissioned to adjust *B.'s* accounts, and, finding that an action was about to be commenced against *B.*, by the plaintiff, wrote a letter to *A.*, blaming him for allowing the plaintiff to sue, and concluded by saying: "If you will be misled by an attorney who only considers his own interest, you will have to repent it. You may think, when you have once ordered your attorney to write to *B.*, he would not do any more without your further orders; but, if you once set him about it, he will go to any length without further orders." The plaintiff brought an action for a libel; and Mr. Justice *Richardson*, who tried the cause, was of opinion, that the defendant was not authorized to write such a letter; and he left it to the Jury to consider, whether the expressions contained therein, alluded to the plaintiff in particular, or to professional men generally: and they thought that it was intended to apply to the plaintiff individually, and found a verdict for him. On a motion

(*a*) 3 B. Moore, 223; *S. C.* 1 Brod. & Bing. 7.

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to set aside the verdict, the Court held that it was properly left to the Jury: and Lord Chief Justice *Dallas* said, "The Jury, by their verdict, have found that the letter was written with a malicious intent, and I cannot say that I think its contents were merely confidential; for it comprises a general reflection on the professional character of the plaintiff." So, here, the defendant's letter to *Hoggart* contained the strongest possible reflection on the character of the plaintiff, and far exceeded a confidential communication. Besides, as Lord Chief Justice *Dallas* said, in *Godson* v. *Home* the defendant desired a third person to shew the letter to others; and here, the defendant circulated the letter himself in a public auction-room.

Mr. Justice BURROUGH.—I expected that I should have tried this cause, and therefore read the declaration with great attention, and I thought, that, if the words of the libel therein set out were proved, the trial would be no more than a mere writ of enquiry. But the question now is, whether the printed paper, circulated by the defendant in the auction-room, is or is not a libel. I am clearly of opinion that it is a libel upon the face of it, and that the verdict found for the defendant is against law. It is only necessary to look at the commencement of the defendant's letter to *Hoggart*, *viz.* "that there was no occasion for the plaintiff to resort to the *wicked expedient* he was attempting." That is clearly libellous. But he goes on and says: "His object is either to extract money out of the pocket of an unwary purchaser, or, what is more likely, by means of this threat of publication, to extort money from me."—To extract money from the one, or to extort it from the other, is, in either case, a charge of fraud. No person of common sense can therefore doubt that this is a libel. It is not only highly abusive in terms, but it contains a charge of fraud from beginning to end. It is never necessary to prove malice in such a case; the

law implies it; and, if the writing be a libel on the face of it, it is for the Judge to say so. This is not like the case of an indictment or information; but even there, the Judge, before whom it is tried, declares his opinion as to whether the words charged are libellous or not; and if this had been an indictment, and tried before me, I should certainly have told the Jury that the statement made by the defendant was clearly a libel.

Mr. Justice GASELEE.—If the Jury came to a wrong conclusion, it was certainly my fault, as I left it to them to say whether the defendant, by using the expression, that "the plaintiff's object was either to extract money out of the pocket of an unwary purchaser, or, what was more likely, by means of the threat of publication, to extort money from the defendant," intended to impute fraud to the plaintiff; or whether such remarks were relevant to the sale of the bond, and exceeding the bounds of moderation only from warmth of feeling; or whether the expressions were totally irrelevant, and the defendant went out of his way for the purpose of slandering the plaintiff. Until corrected to-day, if I had been a juror, I should have come to the same conclusion; and on these grounds—*First*, the bond in question was the subject of litigation. Suits, both at law and in equity, were pending upon it at the time it was advertised for sale. A previous negotiation had been going on between the plaintiff and defendant, in the course of which the defendant had offered the plaintiff 1000*l.* to end all matters in dispute; but the plaintiff demanded 1250*l.*, which on the defendant's refusing to give, the plaintiff said, I will advertise the bond, and the defendant shall see the advertisement under his nose. The bond was accordingly advertised to be sold by *Hoggart*, the auctioneer, who wrote to the defendant, apprizing him of the fact, and desiring him to pay the bond, in order to prevent its coming into

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the market, to which the defendant returned an answer, stating, that the bond was not worth one farthing; that he had no means of preventing *Hoggart's* carrying into the market an article of no value; and that, if he were to offer it to the defendant for 10*l.*, he should hesitate about accepting the offer. It, therefore, appeared to me that the defendant was warranted in supposing, that the purpose of advertising the bond for sale, was, to induce him to purchase it, or to come to some terms. Thus far, therefore, the defendant's answer to *Hoggart's* letter was in the nature of a private or confidential communication, and, as such, privileged. The first part of the statement circulated by the defendant reflected rather on Mr. *Hoggart* than on the plaintiff, as he asked the former how he could reconcile it with his character, to suppress the facts with which he was acquainted. I, therefore, on the whole, left it to the Jury to say, whether, as the defendant was in duty bound to give notice to those who attended at the sale, of the circumstances under which the bond was offered to them, he used the expressions complained of against the plaintiff with a malicious intent, or in the mere warmth of the moment; and I said, that, in the latter case, the defendant would be entitled to a verdict; but that, if he had gone out of his way, for the purpose of imputing misconduct to the plaintiff, or slandering him, then that the latter was entitled to a verdict. Probably I did wrong, and if so, there ought to be a new trial.

Rule absolute for a new trial.

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ROUTLEDGE *v.* GRANT. *4 Bing. 653*

Tuesday, May 13th.

THIS was an action of *assumpsit*, for the breach of an agreement. The *first* count of the declaration stated:—"That, before and at the time of making the agreement thereinafter next mentioned, the plaintiff was lawfully possessed, that is to say, for the residue of a certain term of years, to expire on the 25th *December*, 1856, of a certain dwelling-house and premises, situate &c., and thereupon, theretofore, to wit, on the 29th of *April*, 1825, at &c., by a certain agreement then and there made between the plaintiff and defendant, it was agreed that the defendant should pay a premium of 2750*l.* upon receiving a lease of the said premises for 21 years, at and under the yearly rent of 250*l.*, with the option (upon giving six months' previous notice to the landlord or his agent) of having the time extended to 31 years, paying the same yearly rent as before, for such extended time of 10 years beyond 21 years; and that the defendant should also pay the plaintiff for the fixtures, at a valuation; and by the said agreement, possession was to be given on or before the 25th of *July* then next, to which time all taxes and outgoings were to be discharged by the plaintiff: as by the said agreement (reference being thereunto had) will more fully appear." The plaintiff then, after averring mutual promises, alleged, "that he was always, from the time of making the agreement, up to and on the 6th day of *April*, 1826, ready and willing to grant and execute a good and sufficient lease of the premises to the defendant, pursuant to the terms of the agreement, and afterwards, to wit, on the 25th *July* next after the time of the making of the agreement, did actually tender to the defendant, for his approbation thereof, a

The defendant offered to purchase of the plaintiff the lease of a house, requiring possession to be given *on the 25th July*, and a definitive answer within six weeks. The plaintiff accepted the proposal, offering possession *on the 1st August*. The defendant afterwards, and before the six weeks had expired, retracted his offer:—*Held*, that the plaintiff's acceptance of the defendant's offer not being in the terms proposed, and no proper acceptance of it having been given before the defendant withdrew, the agreement was vacated.

The plaintiff, in the *first* and *third* counts of his declaration, alleged, that, at the time of making the agreement with the defendant, he was possessed of a house, for a certain term of years, *to expire on the 25th December*, 1856; and, in the *second*, that he was entitled to the term *under and by virtue of a certain contract*. The proof was, that the plaintiff was possessed of a term of *twelve* years only; and there was *no* contract or agreement under which he was at that time entitled to an extension of the term:—*Held*, that this was a fatal variance, although it appeared that the plaintiff had since become possessed of a lease to expire in *December*, 1856.

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draft of such lease, and did offer to execute and deliver, and would then and there have executed and delivered, to the defendant, such lease; but that the defendant absolutely discharged the plaintiff from executing the same, or any lease whatsoever of the premises; and that the plaintiff, in further performance of the agreement on his part (he, the plaintiff, having previously discharged all taxes and outgoings then due and owing in respect of the premises), did, on &c. last mentioned, actually surrender and give up possession of the premises to the defendant; but that the defendant wholly disclaimed such possession, and abandoned the same to the plaintiff: and that the plaintiff, in further performance of the agreement on his part, did, on &c. last mentioned, appoint and procure one *J. A.* a broker on his part, in order to make a fair appraisement and valuation of the fixtures in the agreement mentioned; and the said *J. A.* was ready and willing to appraise and value the same accordingly, whereof the defendant had notice, and was requested by the plaintiff to appoint and procure some person as a broker on his part, to make such appraisement and valuation; but that the defendant wholly refused to appoint and procure any person for such purpose; and, not regarding the terms and conditions of the agreement, nor his promise and undertaking, but contriving &c., did not nor would, on &c., pay to the plaintiff the said sum of 2750*l.* in the agreement mentioned, or any part thereof, although the defendant was, on &c., and often afterwards, at &c., requested by the plaintiff to pay him the same; and, thereupon, the plaintiff afterwards, and after a reasonable time in that behalf had elapsed, to wit, on the 25th *February*, 1826, at &c., put up the said dwelling-house and premises to let by public auction, for the same term, and subject to the same rent, as were respectively specified in the agreement; and the same were sold for such term, and subject to such rent, as aforesaid, for a much less price than the said price which the defendant had agreed to pay for the same, to wit, for the sum

of 520*l.*; whereby there became and was a loss and deficiency between the said price which the defendant had agreed to give for the said dwelling-house and premises, and the said price for which the same were so sold as aforesaid, to a large amount, to wit, to the amount of 2230*l.*: of which the defendant had notice, and was required by the plaintiff to pay and make good to him the said last-mentioned sum of money, as he ought lawfully to have done, according to the true intent and meaning of the said agreement so made as aforesaid; but, the defendant did wholly refuse to pay the said last-mentioned sum, or any part thereof, to the plaintiff, and hath ever since wholly refused so to do.

The *second* count stated:—"That, before and at the time, &c., the plaintiff was entitled, under and by virtue of a certain contract, to a certain term, to wit, a term of thirty-two years from the 25th *December*, 1824, of and in a certain other dwelling-house and premises, situate &c., and which said last-mentioned term was contracted and agreed to be granted to the plaintiff by one *John Anthony Hermon*, who then and there had lawful authority in that behalf; and thereupon, afterwards, to wit, on the 18th *March*, 1825, at &c. aforesaid, the defendant proposed and agreed to and with the plaintiff, to pay a premium of 2750*l.* upon receiving a lease of the said last-mentioned dwelling-house for twenty-one years, at and under the yearly rent of 250*l.*, with the option of having the time extended to thirty-one years, paying the same yearly rent as before for such extended time of ten years beyond twenty-one years; and that a definitive answer to such proposal should be given by the plaintiff within six weeks from the time of making the agreement. It was then averred, that, within six weeks from the time of making the said last-mentioned agreement, to wit, on the 29th *April* in the year aforesaid, the plaintiff returned a definitive answer to the said proposal and agreement of the defendant, and

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gave him, notice that he, the plaintiff, acceded to the same; whereby the defendant became liable to fulfil the terms and conditions thereof: and that the said *J. A. Hermon*, after the making of such proposal and agreement by the defendant, and before the expiration of six weeks from the time of making thereof, to wit, on the 21st *April*, 1825, (the said *J. A. Hermon* then and there having lawful authority in that behalf,) did, by a certain indenture, under his hand and seal, grant, demise, and let the said last mentioned dwelling-house and premises unto the plaintiff, to hold the same to the plaintiff, his executors, &c., for and unto the term of thirty-two years, commencing and to be computed from the 25th *December* then last. Then followed averments of performance, &c., and breach, as in the *first* count.

The *third* count stated:—That the plaintiff, being lawfully possessed, for the residue of a certain term of years, to expire on the 25th *December*, 1856, of a certain other dwelling-house and premises, at the special instance and request of the defendant, bargained and agreed to demise and let the same to the defendant; and that he, the defendant, agreed to take a lease of the same from the plaintiff, for a certain term, to wit, the term of twenty-one years, &c. &c. as before.

Then followed counts for a messuage bargained, sold, and let to the defendant, for a term then to come and unexpired, a count for money paid, and an account stated. The defendant pleaded the general issue.

At the trial, before Lord Chief Justice *Best*, at the Adjourned Sittings at *Guildhall*, after the last *Michaelmas* Term, it appeared, that the plaintiff occupied a house in *St. James's Street*, which he held under a lease from a Mr. *Hermon*, who was seised in fee, for a term of which about twelve years were unexpired at *Lady-day*, 1825; that the defendant, being desirous to take a lease of the premises for an extended term, after several previous conversations

with the plaintiff on the subject, on the 18th *March*, 1825, sent him the following written proposal:—

" Mr. *Grant's* Proposal.

" To pay a premium of *2750l.*, upon receiving a lease for twenty-one years, with the option (upon giving six months' previous notice to the landlord or his agent) of having the time extended to thirty-one years, paying the same yearly rent as before, for such extended term of ten years beyond twenty-one years. Rent *250l.* Mr. *Grant* to pay for the fixtures at a valuation. Possession to be given *on or before the 25th July next*, to which time all taxes and outgoings are to be discharged by Mr. *Routledge*, and a definitive answer to be given within six weeks from the 18th *March*, 1825."

The plaintiff, having applied to Mr. *Hermon*, his landlord, for an extension of his term, in order to enable him to grant the lease to the defendant, as above proposed, wrote the following note to the defendant on the 6th of *April*:—

" Mr. *Routledge* begs to say, that he accepts Mr. *Grant's* offer for his house, No. 59, *St. James's Street*, and that he will give Mr. *Grant* possession *on the 1st August next*.

" Mr. *R.* will esteem it a particular favour if Mr. *Grant* will not, for the present, name the subject to any one."

On the 7th of *April*, the defendant returned the following answer:—

" Sir,—I received your note last night, and hasten to acquaint you, that, having considered as confidential the negotiation respecting your house, I had mentioned it to no one; but, upon consulting with a friend this morning, in whose opinion I have more confidence than my own, I

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am advised, for some reasons which had not occurred to myself, not to think of taking a house in *St. James's Street* for a dwelling-house. May I, therefore, request you to permit me to withdraw the proposal I made to you about it? I am in hopes you will make no hesitation to do this, when you consider the spirit of candour and openness in which it was made to you. But, should it be otherwise, as I am the last that would willingly act with inconsistency, I will willingly refer the question to friends for decision, and abide by their opinion of the case. I have the honour to be, &c.

Alex. Grant."

On the following day, the plaintiff replied as follows:—

"*8th April*, 1825.

"Sir,—In answer to your letter of yesterday, I beg to state, that, relying upon your performing the agreement for the purchase of my house in *St. James's Street*, I have taken another house, and made arrangements which I cannot, without great loss and inconvenience, relinquish. I hope, therefore, that you will not wish me to withdraw it. I am, &c.

Thomas Routledge."

The defendant sent the following letter on the 9th *April*:—

"Sir,—Your note of yeterday evening surprises me, being altogether at variance with your conversation with me, two or three hours previous to your note, dated in the evening of the 6th; in which, you must recollect, you one moment declared yourself off; and, finally, you went away to have the opinion of Mrs. *Routledge* about the answer you were to send me. How, therefore, you can, under such circumstances, suffer loss and inconvenience from my declining to proceed further in the treaty, I am at a loss to imagine; and I was in hopes you would have been satisfied with what I had stated in reply to your first note, to have

had the liberality to have let the matter drop. But, if that should not be your intention, I have only to add, you may proceed with your claim for "loss and inconvenience," as you may think most advisable. I am, &c.

Alex^r. Grant."

The plaintiff gave up his then existing lease to his landlord, Mr. *Hermon*, and obtained from him a new lease, dated the 21st *April*, 1825, for the term of thirty-two years from the 25th *December*, 1824, at the yearly rent of 250*l.*, with covenants similar to those contained in the former lease; after which the plaintiff wrote to the defendant, requesting an interview; when the latter not appearing to be willing to accept the proposed lease, the plaintiff wrote to him as follows:—

"Sir,—Upon referring to my letter to you of the 6th instant, accepting your offer for my house, No. 59, *St. James's Street*, I perceive that I, by mistake, stated that I would give possession *on the 1st day of August next.* By your offer, you state that possession is to be given *on or before the 25th July next;* and I inform you that I am ready to give you possession *according to your proposal.* I am, &c.

29th *April*, 1825." *Thomas Routledge.*"

This letter was delivered at the house of the defendant on the day it bore date. The six weeks from the 18th *March*, 1825, within which time, by the defendant's proposal, a definitive answer was to be given, expired on the 1st *May*. A draft of a lease was prepared, which, together with the keys of the house, was tendered to the defendant on the 25th *July*, the day on which possession was to have been given; and the plaintiff quitted the premises before that day.

The defendant having altogether refused to perform his engagement, the plaintiff, after giving him notice, put up

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the lease to sale by auction, when it was knocked down at *520l.* Mr. *Hermon*, who was called as a witness, stated, that, although there was a conversation between him and the plaintiff, as to extending the term to thirty-two years, *viz.* from 1824 to 1856, still that no written contract was entered into before the lease of the 21st *April* was obtained: and the plaintiff failed in proving that there was any positive verbal agreement on the subject. For the defendant, it was objected,—*first*, that he had a right to withdraw his proposal at any time before the plaintiff had actually accepted it; and that the defendant had retracted his offer, by his letter of the 9th *April*;—*secondly*, that the plaintiff's letter of the 6th *April* could not be considered an acceptance of the proposal, as he offered possession at a later day than that which was mentioned by the defendant:—and *lastly*, that there was a variance between the plaintiff's interest, as alleged in the declaration, and that of which he was proved to be possessed, he having only an interest for twelve years, at the time of the original proposal. His Lordship was of opinion, that the defendant had a right to retract his offer on the 9th of *April*, it not having been at that time accepted by the plaintiff; that he had a right to do so at any time before the plaintiff had actually accepted the terms proposed; and that there was a substantial variance between the plaintiff's title as set out in the declaration, and that proved; and he directed a nonsuit, as the plaintiff had not, at the time of the proposal, the interest in the premises he assumed to dispose of.

Mr. Serjeant *Taddy*, in the course of the last Term, obtained a rule *nisi*, that the nonsuit might be set aside, and a new trial granted; and submitted, that, by the terms of the defendant's proposal, he was bound during the whole six weeks; but that the plaintiff was to have that time for consideration, and that he might within that period either have

accepted or rescinded the contract: and, as he did accept it within that period, the defendant could not withdraw his proposal, having once made it. In *Adams* v. *Lindsell* (*a*), *A.*, by letter, offered to sell to *B.* certain specified goods, receiving an answer by return of post; and, the letter being misdirected, the answer notifying the acceptance arrived two days later than it ought to have done; and on the day following that on which it would have arrived if the original letter had been properly directed, *A.* sold the goods to a third person:—it was held, that there was a binding contract, from the moment the offer was accepted. There, the cases of *Payne* v. *Cave* (*b*), and *Cooke* v. *Oxley* (*c*), were relied on; and particularly the latter, where the defendant, who had proposed to sell goods to the plaintiff, and had given him a certain time, at his request, to determine whether he would purchase them or not, was held not liable to the performance of the contract, although the plaintiff, within the specified time, had determined to purchase them, and had given the defendant notice to that effect; but the ground on which *Adams* v. *Lindsell* was decided, was, that, at the time the contract was entered into, the engagement was all on one side, and that there was no consideration for the defendant's promise. Although here, the plaintiff did not accept the defendant's proposal in terms, as he stated that he would give the latter possession on the 1st *August*, yet no objection was made on that account. So, although, at the time of the proposal, the plaintiff had only an interest in the premises for twelve years, yet, as the term was afterwards extended to thirty-two years by the landlord, from whom he obtained a lease for the full term, it was sufficient; for, in *Thompson* v. *Miles*, Lord *Kenyon* said (*d*), that it had been solemnly adjudged, "that, if a party sells an estate without having ti-

(*a*) 1 Barn. & Ald. 681.
(*b*) 3 Term Rep. 148.
(*c*) Id. 653.
(*d*) 1 Esp. Rep. 186.

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tle, but, before he is called upon to make a conveyance, he gets such an estate as will enable him to make a title, that is sufficient."—With respect to the alleged variance, the second count of the declaration was supported by the evidence, as it stated that the plaintiff was entitled to a certain term under a contract between him and his landlord, and the latter was proved to have acquiesced in the proposal to extend the plaintiff's interest in the premises from twelve to thirty-two years.

Mr. Serjeant *Wilde* now shewed cause.—Neither of the counts in the declaration can be supported; as, from the time of the defendant's proposal on the 18th *March*, to the 7th *April*, when he withdrew it, the plaintiff could not grant a lease for thirty-one years, he having only an existing lease or interest in the premises for twelve years. There was no valid contract between the plaintiff and his landlord, Mr. *Hermon*, by which both parties were bound. By the terms of the original proposal, the defendant agreed to pay a premium, on receiving a lease for twenty-one years, with the option of having it extended to thirty-one, and *possession was to be given on or before the 25th July* then next. That was one of the conditions in the proposal. On the 6th *April*, the plaintiff wrote to the defendant, saying, that he accepted his offer, and that he would give him possession *on the 1st August*; and, on the 7th *April*, the defendant withdrew his proposal, which he had clearly a right to do, as he might dissent from being kept out of possession until the 1st *August*, he having positively required it to be given to him on the 25th *July* preceding. The principle established in *Adams* v. *Lindsell* need not be disputed, *viz.*, that, if a person offer to sell goods to another, and give him time to return an answer, and the latter notify his acceptance of the offer, it is a valid bargain, as the offer continues to the time of the

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receipt of the answer, by which it might be accepted or rejected. But, although one party may propose a bargain to another, he may withdraw it at any time before it is accepted; for, until actual acceptance, there is no contract to bind either party. Here, however, the defendant required a definitive answer to be given within six weeks from the day of the first proposal; and he had a right to withdraw it at any time within that period. So, the plaintiff had six weeks to accept or reject the proposal; and his answer, stating that he would give possession on the 1st *August*, cannot be said to amount to an acceptance. In *Kennedy* v. *Lee*, where there was a contract by letter, Lord *Eldon* said (*a*): "I have always understood the law of the Court to be, with reference to this sort of contract, that, if a person communicates his acceptance of an offer within a reasonable time after the offer being made, and if, within a reasonable time of the acceptance being communicated, *no variation has been made by either party* in the terms of the offer so made and accepted, the acceptance must be taken as simultaneous with the offer, and both together as constituting such an agreement as the Court will execute." Here, however, the difference of the period at which possession was to be given might be most material to the defendant, and was a complete deviation by the plaintiff from the terms of the original proposal; and, as the defendant repudiated it on the 9th *April*, the plaintiff's letter of the 29th, in which he acknowledged his mistake, and informed the defendant that he was ready to give him possession on the 25th *July*, according to his proposal, cannot avail him. The defendant was not bound to accede to a qualified proposal, after he had withdrawn his original offer. At all events, at the time the first proposal was made, the plaintiff was not in a situation to comply with it; and, even if he

(*a*) 3 Meriv. 454.

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had been, he did not shew that he had then entered into any *contract* with *Hermon*, his landlord, for extending his term to twenty-one or thirty-one years: and such a contract, to be binding, must have been in writing. The allegation in the second count, therefore, was not proved; and it is quite clear that the first and third cannot be supported.

Mr. Serjeant *Taddy*, and Mr. Serjeant *Jones*, in support of the rule.—It was not competent to the defendant to withdraw from his original proposal at any time within the six weeks allowed the plaintiff to consider of it, and within which he was to give a definitive answer. As the plaintiff accepted the proposal within the six weeks, the defendant was bound by it. An immediate or definitive answer could not be required. The defendant could not withdraw his offer on the day following that on which it was made. In his letter of the 7th *April*, he requested the plaintiff to *permit* him to withdraw the proposal. That, therefore, shews that he did not consider that he had a *right to* withdraw it until the six weeks had expired. He never objected to the trifling variation as to the time at which possession was to be given. His evident meaning was, to propose certain terms to the plaintiff, and to give him six weeks to accept or reject them; and if a party make a proposal to another, and give him a definite time to consider of the terms proffered, it is not necessary for the latter to accede to it immediately. Here, the defendant's offer was made on a good and sufficient consideration, to which the plaintiff acceded before the expiration of the time limited for that purpose. In *Adams* v. *Lindsell*, the Court held, that the party who proposed to sell the goods, could not retract after the offer was made, although the acceptance of the offer arrived two days later than it ought to have done, and the party who had made the offer had sold the goods to a third person. There, the sale having taken

place before the offer was accepted, was a complete retractation of the contract. In *Cooke* v. *Oxley*, there was no consideration to bind the defendant; and Lord *Kenyon* put it expressly on that ground, as he said, "that, at the time of entering into the contract, the engagement was all on one side; that the other party was not bound; and that it was therefore *nudum pactum*;" and Mr. Justice *Buller* said, "It is impossible to support the declaration in any point of view. The promise can only be supported on the ground of a new contract made at four o'clock; but it is not stated that the defendant did agree at four o'clock to the terms of the sale, or even that the goods were kept till that time." If, therefore, these facts had been alleged in the declaration in that case, and the plaintiff had proved them, it must be inferred that the defendant would have been held liable to the plaintiff for not delivering the goods according to his proposal. Here, however, there was a sufficient consideration for the defendant's offer, which was executory in the first instance. He agreed, upon receiving a lease for twenty-one or thirty-one years, to pay the plaintiff a certain sum, and gave him six weeks to send a definitive answer; and as the plaintiff accepted the proposal within that period, and actually tendered a lease according to the terms of the offer, he was clearly entitled to recover.—With respect to the objection of the variance between the declaration and the proof, as to the nature of the interest which the plaintiff had in the premises, it is altogether without foundation. He was not bound to have a complete legal title at the time of the defendant's proposal; it is sufficient if he obtained it before the expiration of the period allowed him for the fulfilment of the contract. The defendant proposed to pay a premium upon receiving a lease for twenty-one years, with the option of having the time extended to thirty-one years. The defendant, therefore, did not suppose that the plaintiff actually had the extended

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term at the time he made the offer, but only that he was empowered to obtain it: and, as he afterwards did procure such lease from his landlord, the time when his original lease expired was altogether immaterial. Although the plaintiff has alleged that he was possessed of the residue of a term to expire on the 25th *December*, 1856, yet he was not bound to prove it in the terms laid. In *Carrick* v. *Blagrave* (*a*), in covenant for non-payment of rent, on an indenture, by the assignee of the lessor against the lessee, the declaration alleged that the lessor was possessed for the remainder of a term of twenty-two years, commencing from the 25th *December*, 1797, and that, on the 7th *March*, 1811, he, by indenture, demised to the defendant, to hold from the 20th *December* then last past. The defendant pleaded, that the lessor was not, at the time of making the indenture, possessed for the residue of the said term, in manner and form as the plaintiff had alleged in his declaration; and Lord Chief Justice *Dallas*, in delivering the judgment of the Court, said (*b*): "The second objection is, that, by the plea in question, the precise extent of the term stated in the declaration, is put in issue, and that the plaintiff's title would be defeated, if it appeared that his term was not of the precise extent alleged. If that be so, it is the plaintiff's own fault. If the precise term is materially alleged, the defendant cannot be prevented from traversing it. But the Court are of opinion that such a consequence will not follow. The plea puts in issue the substance of the allegation, which is, that the lessor, being possessed of a term, made a derivative demise to the defendant. The substantial question, therefore, at the trial of such an issue, would be, whether the lessor had a larger term, out of which he could carve this lesser term. It is wholly immaterial whether it was a year, a month, or a day longer than the derivative term: any term for years,

(*a*) 4 B. Moore, 303; *S. C.* 1 Brod. & Bing. 531. (*b*) 4 B. Moore, 311.

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which left the reversion in him, and enabled him to assign, would satisfy the substance of the allegation in the declaration." So, here, it was sufficient if the plaintiff, at the expiration of the six weeks, had that which he proposed to dispose of, *viz.* a lease *to expire in* 1856; and the latter part of the allegation may be rejected as surplusage. At the time of the defendant's first proposal, the plaintiff had every reason to believe that his landlord would extend the term, as required by the defendant. He afterwards did so; and the plaintiff actually tendered the lease to the defendant before the expiration of the six weeks within which time the contract was to be completed, or a definitive answer given by him. According, therefore, to the doctrine of Lord *Kenyon*, in *Thompson* v. *Miles*, if the plaintiff had procured such a term in the premises as to enable him to grant a lease to the defendant for twenty-one or thirty-one years, at the option of the latter, it was sufficient; and, on the 25th *April*, the plaintiff was ready to give the defendant possession, according to the terms of his proposal.

Lord Chief Justice BEST.—I am of opinion, that the nonsuit was right upon both grounds. I shall not follow the argument used for the plaintiff in support of the application to set it aside, but shall confine myself to the ground on which I decided at *Nisi Prius*. There was a proposal, by the defendant, to take a lease from the plaintiff on certain terms, *viz.* that possession should be given him on or before the 25th *July*, 1825. To this proposal the plaintiff was to give a definitive answer within six weeks from the 18th *March*, 1825. Now, I am of opinion, that, if six weeks are given by one party to accept an offer, the other has the same period to put an end to it. The contract must be mutual, and one party cannot be bound without the other. In *Cooke* v. *Oxley*, the defendant proposed to sell a quantity of tobacco to the plaintiff, at a certain price,

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and the latter desired him to give him time to agree to or dissent from the proposal, till the hour of four in the afternoon of the day on which the proposal was made, to which the defendant agreed; and the plaintiff having sued the defendant for not delivering the tobacco, Lord *Kenyon* said: "Nothing can be clearer, than that, at the time of entering into this contract, the engagement was all on one side; the other party was not bound; it was, therefore, *nudum pactum:*" and Mr. Justice *Buller* said: "It has been argued, that this must be taken to be a complete sale from the time when the condition was complied with: but it was not complied with, for it is not stated that the defendant did agree at four o'clock to the terms of the sale, or even that the goods were kept till that time."—That appears to me to be the true principle on which this case must be decided, and on which I acted at *Nisi Prius;* because, at the time of entering into the contract, the engagement was all on one side, and the defendant had six weeks to retract his offer, which he did on the 9th *April*, it not having been at that time accepted by the plaintiff. In *Payne* v. *Cave*, it was held, that a bidder at an auction might retract his bidding any time before the hammer is down; and the Court there said: "The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding; that is signified on the part of the seller by knocking down the hammer, which was not done here till the defendant had retracted. An auction is not unaptly called *locus pœnitentiæ*. Every bidding is nothing more than an offer on one side, which is not binding on the other side till it is assented to. But, according to what is now contended for, one party would be bound by the offer, and the other not; which can never be allowed." We must not limit the principle established by that case, to a party bidding at an auction, or be led away by too nice refinements; but the ground on which I decide this case, is, that, until both parties had agreed to the

terms proposed by the defendant, either had a right to rescind or put an end to the contract. But it has been said, that the cases of *Payne* v. *Cave*, and *Cooke* v. *Oxley*, have been broken in upon by that of *Adams* v. *Lindsell*. I do not dispute the authority of that case; but I think it does not apply to the present. There, the defendants offered to sell to the plaintiffs certain goods, receiving an answer *by return of post;* and, on its being insisted, that, until the answer was actually received, there could be no binding contract between the parties, the Court said, "that, if that were so, no contract could ever be completed by the post. For, if the defendants were not bound by their offer, when accepted by the plaintiffs, till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs, and then the contract is completed by the acceptance of it by the latter." Here, however, if the defendant must be considered as continuing to make the offer until it was accepted by the plaintiff, yet the latter might say that he would not accept it at any time within six weeks from the day of the first proposal. If a case were to arise, in which the question might be directly brought before us, it might be perhaps necessary to consider the decision of the Court in *Adams* v. *Lindsell;* but I cannot admit, that, where a man says he will sell goods on certain terms, receiving an answer by return of post, he is bound by such offer if the letter do not come to hand in due course, either through the default of the parties, or the negligence of the postman. In *Adams* v. *Lindsell*, however, the defendants' letter containing the proposal was misdirected by them; and the Court there said: that, as to the delay in the plaintiffs' notifying the acceptance of the letter, it arose entirely from the mis-

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take of the defendants, and that it, therefore, must be taken, as against them, that the plaintiffs' answer was received in course of post; and the Court decided on that ground; so that it is now unnecessary to touch that decision. But, in this case, the defendant himself repudiated the contract on the 9th *April*, at a time when it was not completed or accepted by the plaintiff, and before the expiration of the six weeks: and he could not afterwards call upon the plaintiff to enforce it. With respect to the question of variance, I am of opinion, that none of the counts of the declaration were proved. It was alleged, in the first and third, that the plaintiff's term was to expire on the 25th *December*, 1856; and, in the second, that he was entitled to a term of thirty-two years, under a contract between him and *Hermon*, who was authorized in that behalf; whereas, he had only a term of twelve years at the time of the proposal; and, although it was not necessary that the plaintiff should have the precise interest stated, or aver the particular day when his term would expire; yet, he should at least have shewn that he had such a species of interest in the premises as would have enabled him to perform his contract according to the terms agreed on. This, therefore, was not a variance in form, but in substance. There was no contract for thirty-two years between the plaintiff and *Hermon*, as stated in the second count; and, even if there had been such a contract, in order to be valid, it must have been in writing; but not even a parol contract to that effect was proved. I am, therefore, of opinion, that, on both these grounds, this rule must be discharged.

Mr. Justice BURROUGH (*a*).—All the counts in the declaration are framed on the supposition of the plaintiff's having an existing interest in the premises, to expire at a certain period; and he altogether failed in proving that he had such

(*a*) Mr. Justice *Park* was absent at Chambers.

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an interest. I am, therefore, of opinion, that the variance is fatal.

Mr. Justice GASELEE.—If this case had rested wholly on the first point, I should have wished for time to consider, as the authorities to which we have been referred appear to be contradictory; but I am clearly of opinion that the objection as to the variance is well founded.

Rule discharged.

DITCHAM *v.* CHIVIS.

Wednesday, May 14th.

THIS was an action against the defendant, the proprietor of a stage-coach, for not safely conveying the plaintiff from *London* to *Blackheath*. The declaration stated, that the defendant, before and at the time of committing the grievance thereinafter next mentioned, was owner and proprietor of a common stage-coach for the carriage and conveyance of passengers *from London to Blackheath*, for hire and reward to him, the defendant, in that behalf; and that, he being such owner and proprietor, theretofore, to wit, on the 1st *August*, 1827, at *London* aforesaid, the plaintiff, at the special instance and request of the defendant, agreed to become an outside passenger on the said coach, to be safely and securely carried and conveyed from *London* aforesaid to *Blackheath* aforesaid, for certain fare and reward to the defendant in that behalf, and the defendant then and there agreed to receive the plaintiff as such outside passenger; and thereupon it became and was his duty to use due and proper care that the plaintiff should be safely and securely carried and conveyed by and upon

In an action on the case against the proprietor of a stage-coach, for an injury sustained by a passenger, the declaration alleged, that the defendant was the owner of a stage-coach for the conveyance of passengers from *London* to *Blackheath*, and that the plaintiff had *agreed* to become a passenger, and that the defendant had *agreed* to receive her as such passenger, to be carried from *London* to *Blackheath*; and the evidence was, that the words "*London* to *Blackheath*" were painted on the coach-door; that the coach was licensed to run from *Charing-Cross* only; and that the plaintiff was taken up at the *Elephant and Castle* in *St. George's Fields*:—Held, that, as *Charing-Cross* and *St. George's Fields* are both in common parlance styled "*London*," the variance was immaterial, and the allegation sufficiently proved.

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the said stage-coach, from *London* aforesaid to *Blackheath* aforesaid; yet the defendant, not regarding his duty in that behalf, did not use due and proper care that the plaintiff should be safely and securely carried, &c., from *London* to *Blackheath*, but wholly neglected so to do, and drove, and suffered and permitted the horses attached and fastened to the said stage-coach to draw and move, the said coach whilst the plaintiff was in the act of ascending and getting upon the said coach to take her place as such outside passenger; by means whereof the plaintiff was thrown with great force and violence off and from the hind part of the coach on which she was resting or standing, and cast and thrown upon the ground, and thereby became so greatly bruised, wounded, and injured, that she was forced and obliged to pay a large sum of money in endeavouring to be cured, &c. &c. The defendant pleaded the general issue.

At the trial, before Mr. Justice *Park*, at *Guildhall*, at the Sittings after last *Michaelmas* Term, it appeared, that, on the 1st *August*, 1827, the plaintiff, a poor and aged woman, was in the act of getting upon the hind part of the defendant's coach, at the *Elephant and Castle*, in *St. George's Fields;* that a person attending the coach was assisting her to get upon it, when the coachman drove on, in consequence of which the plaintiff fell off and received a severe injury in her knee; that the coach was licensed to carry passengers for hire, between *Charing-Cross*, in the city of *Westminster*, and *Blackheath*, being a distance of *seven* miles; that the words "*London*" and "*Blackheath*" were painted on the pannels; and that the coach invariably went from *Charing-Cross*, and not from the city of *London;* though by going through a part of the latter, *viz.* through *Fleet-street*, and over *Blackfriar's-bridge*, the defendant would not exceed the limits of his license; but that, if the coach went beyond the licensed number of miles, he would be liable to a penalty. It was objected, that, as the plain-

tiff became a passenger at the *Elephant and Castle*, the allegation in the declaration, that she had agreed to become a passenger to be carried from *London* to *Blackheath* was not proved; and that the allegation that the defendant was the owner of a coach for the conveyance of passengers from *London* to *Blackheath*, was not supported by proof that the defendant's coach was licensed to run from *Westminster* to *Blackheath*. The learned Judge thought, that, as *Westminster* is in common parlance styled *London*, and as the coach was held out to the world as running from *London* to *Blackheath*, and passengers, whether taken up at *Charing-Cross* or the *Elephant and Castle*, paid the fare for the whole distance, the evidence was sufficient to support the declaration; and he left it to the Jury to say, whether the defendant's coachman had acted improperly and negligently, in driving off at the *Elephant and Castle* without first inquiring whether all was safe. The Jury found that he had, and accordingly returned a verdict for the plaintiff—damages 70*l*. Leave having been reserved to the defendant to move to set aside this verdict, and that a nonsuit might be entered, in case the Court should be of opinion that the objections taken at the trial were well founded—

Mr. Serjeant *Taddy*, in the last Term, obtained a rule *nisi*, against which—

Mr. Serjeant *Wilde* now shewed cause. The allegation in the declaration, that the plaintiff had *agreed* to become a passenger by the defendant's coach, and that the defendant had *agreed* to receive her as such, was fully supported by the evidence. The gist of the action was, the not causing the plaintiff to be conveyed with safety, and the injury inflicted on her through the defendant's carelessness. The coach was licensed to run a certain and limited distance, and from and to certain places, *viz.* from *Charing-Cross*

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to *Blackheath*. The words "*London* to *Blackheath*," however, were painted on the coach, which held out to the world an agreement that it should run *from* and to those places. The contract, therefore, was correctly stated in the declaration, which did not require the same precision and accuracy that might have been necessary had the mere breach of contract formed the foundation of the action. The fact of the plaintiff's having only contracted with the defendant to be carried from the *Elephant and Castle*, which is neither within *London* nor *Westminster*, but at a considerable distance from both, is perfectly immaterial, the fare being to be paid as for the whole journey. In *Burbige* v. *Jukes* (*a*), which was an action on the case for raising the footpath on each side of the plaintiff's house, the declaration stated, that the plaintiff was possessed of a messuage "at *Sheerness*, in the county of *Kent*," and, at the trial, it was proved that the house was situate in the parish of *Minster*, which is contiguous to *Sheerness*, but not actually within it, though both places usually go by the name of *Sheerness*; and the Court thought, that, as the house was not stated to be in the *parish* of *Sheerness*, it was well enough, since it appeared to be within the *district* of *Sheerness*. In *Frith* v. *Gray* (*b*), in an action on an agreement that the defendant would procure the plaintiff a booth at a horse-race on *Barnet Common*, the declaration stated, that, there being to be had a certain entertainment of horse-racing upon *Barnet Common*, in *the county of Middlesex*, it was agreed, &c., and, at the trial, it was proved, that the whole of *Barnet Common* was in the county of *Hertford*; and an objection was thereupon taken, on the ground of variance: but Lord *Mansfield*, on a motion for a new trial, said, that the gist of the agreement was, the procuring the booth upon *Barnet Common*, that it was perfectly immaterial whether *Barnet Common*

(*a*) 1 Bos. & Pul. 225. (*b*) 4 Term Rep. 561, n.

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were in *Middlesex* or not, and, therefore, that those words in the declaration might be rejected. In *Drewry* v. *Thies* (*a*), proof that the defendant's boat ran down the plaintiff's in the *Halfway Reach*, in the *Thames*, was held to support an allegation that the boat was run down in the *Thames*, near the *Halfway Reach*; and Mr. Justice *Buller* there said: "This is an action upon the case for misfeasance, which is transitory in its nature, and, therefore, the objection ought not to prevail." So, here, the gist of the action was, the misfeasance or negligence of the defendant, in not carrying the plaintiff with due care; and it is perfectly immaterial whether she had got on the coach at the place from which it started, or at a short distance from it. In *The Mersey and Irwell Navigation* v. *Douglas* (*b*), it was held, that it was not necessary, in an action for diverting the water of a navigation, to give a local description to the nuisance. There, the river *Irwell* was stated in the declaration to be at *Preston*, and the plaintiff failed in proving that the river was at *Preston*. So, here, the declaration would have been sufficient, if the plaintiff had merely alleged that the defendant, as the owner of the coach, had accepted the plaintiff to be conveyed as an outside passenger, to wit, at *London*, to be carried from thence to *Blackheath*; as, in common acceptation, *London* is not to be understood as meaning only the city, but extends to the neighbourhood, or those parts which are *generally called London*.

Mr. Serjeant *Taddy*, and Mr. Serjeant *Andrews*, in support of the rule. It is unnecessarily stated in the declaration, that the plaintiff *agreed* to become an outside passenger on the defendant's coach, to be safely carried from *London* to *Blackheath*, and that the defendant *agreed* to receive her as such. That allegation, therefore, should

(*a*) 4 Term Rep. 558. (*b*) 2 East, 497.

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have been proved as laid. It is requisite that the rules of law, as to variance, in cases of this description, should be strictly adhered to. In *Bristow* v. *Wright* (*a*), which was an action on the case against the sheriff, for taking goods without leaving a year's rent, the plaintiff set forth the particulars of the demise in his declaration, and not having proved them as set forth, was nonsuited, although the allegation was unnecessary. In *Frith* v. *Gray*, the *contract* on which the action was founded, was, to procure the plaintiff a booth on *Barnet Common*, and it was therefore immaterial where that common was situate. But here, the whole of the contract was stated in the declaration, and no part of it could be rejected as surplusage. In *Drewry* v. *Twiss*, the gist of the action was the running down the plaintiff's boat; and the defendant could not be misled by the allegation, whether the accident happened *in* the *Half-way Reach*, or *near* it. In *Burbige* v. *Jakes*, both the places in question usually went by the general name of *Sheerness*. That, therefore, was the popular and accepted name. In that case, it was observed, that, although *Westminster* is usually called *London*, yet that it was not sufficient so to lay it in pleading; to which the Court seems to have assented. Here, the defendant's duty arose out of his contract to convey, which was entire; and, as the declaration was encumbered with an allegation which the plaintiff could not prove, she ought to have been nonsuited. The *Elephant and Castle*, whence the plaintiff was to become a passenger on the defendant's coach, is situate in *St. George's Fields*, which forms no part of *London*. There had been no previous contract between the parties. No place was booked at the office from which the coach set out. The plaintiff was a mere accidental passenger, waiting at the *Elephant and Castle*, to be carried from thence to *Blackheath*. There could

(*a*) 2 Doug. 665; *S. C.* 1 Term Rep. 235, n.

not, therefore, be any implied *agreement* by the defendant, to carry her from *London* to *Blackheath*.

Lord Chief Justice BEST.—I have always entertained a strong prejudice against objections on the ground of variance between contracts as laid in the declaration, and those proved at the trial; but, although I am most anxious not to yield to them, yet when they are consistent with law, notwithstanding that a party suffers by a mere technical objection, we are bound to allow them. I see, however, enough here to relieve the plaintiff from the objections that have been raised against her right to recover from the defendant for the injury she has sustained. The plaintiff, by using the word *London* in the declaration, did not mean the *City of London*, but that which is usually *called London*. The defendant himself has never performed his contract, if *London* were to be confined to the *City* only; as it was proved that he never went from the *City*, but always from *Charing-Cross*, although the words "*London* to *Blackheath*" were painted on the doors of his coach. He did not mean to confine himself to the conveyance of passengers from the *City of London*, but to convey them from some place which, in common parlance, is *called London*. *Westminster* is, in common acceptation, *London;* although, strictly speaking, the two places are distinct, each having its separate jurisdiction and magistrates. So, *St George's Fields*, for all ordinary purposes, is a part which may be included in the general term *London*. In the case of service of process, in order to set aside the service of a writ in a wrong county, there must be a positive affidavit, shewing that there could be no dispute as to the boundaries (*a*); and here the contract was, a contract to carry from a certain place, which the parties understood to be *London*. In *Burbige* v. *Jakes*, the decla-

(*a*) See ——— v. *Walters*, 1 Chit. 14.

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ration stated that the plaintiff was possessed of a messuage at *Sheerness* in the county of *Kent*; and at the trial it was proved that the house was situate in the parish of *Minster*, which is contiguous to *Sheerness*, but a distinct parish, though both places usually went by the names of *Sheerness*; and, on a motion to set aside a verdict for the plaintiff, on the ground of a variance between the declaration and evidence, the Court were of opinion, that, as the house was not stated to be in the *parish* of *Sheerness*, it was well enough, since it appeared to be within the *district* of *Sheerness*. So, here, the declaration did not state that the defendant's coach ran from the *parish* of St. *Mary-le-bow, in the ward of Cheap*, but from *London*, generally. That case, therefore, is an authority to shew, that the plaintiff has correctly described the contract as being a contract to carry her from *London*,—*Charing Cross* being within the ambit or district of that which, in common parlance, is called *London*.

Mr. Justice PARK.—I am happy that the Court is justified in over-ruling these objections, as the plaintiff certainly sustained a very serious injury, through the misconduct of the defendant's servant.

Mr. Justice GASELEE (*a*).—I have looked through the declaration, to see whether the allegation on which the objections have been raised, can be considered an immaterial allegation; and I cannot so deem it: but, on the ground stated by my Lord Chief Justice, I think the verdict may be supported. The defendant never entertained an idea that his contract was, to convey passengers from *London* to *Blackheath*, and from thence back to *London*; for it was proved that his coach never went through the city. What, therefore, would he say, if, when his passen-

(*a*) Mr. Justice *Burrough* was absent at chambers.

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gage arrived at *Charing-Cross*, they should refuse to pay him, unless he would convey them to *London*? Would he order his coachman to drive them on to the city?—Certainly not. The case of *Burbige* v. *Jakes* appears to me to be an authority in point. There, the house described in the declaration to be in *Sheerness*, was proved to be in the parish of *Minster*, which was contiguous to *Sheerness*; but, as it was within the *district* of *Sheerness*, the Court held that it was sufficient to support the averment that it was in *Sheerness*. So, here, the *Elephant and Castle* is within the limits of *London*. It is merely a house of call. If the plaintiff had been taken up at *New Cross*, or at *Deptford*, the case might have been different, as, in all probability, she would not then have been required to pay the same fare as she would on being taken up at *Charing-Cross*, or at the *Elephant and Castle*.

Rule discharged

FOTHERGILL *v.* WALTON and RONDEAU.

Friday, May 16th.

A defendant in execution on a *ca. sa.* issued upon a judgment obtained against him, applied to be discharged. The plaintiff had become bankrupt, and died intestate. His assignees, and his widow (who administered), both disclaimed having any interest in the damages awarded, or in the subject matter of the suit; but it did not appear that either of them had actually assented to the discharge:—The Court refused to interpose, the legal right to discharge him being in the administratrix.

A RULE was obtained by Mr. Serjeant *Lawes*, in the last Term, calling on the administratrix and the assignees of the plaintiff, who had become bankrupt, and afterwards died intestate, to shew cause why the defendant *Rondeau* should not be discharged out of the custody of the Marshal, as to the execution which had been sued out against him by the plaintiff. The motion was founded on an affidavit by *Rondeau*, which stated, that, by a charter-party, dated the 28th *November*, 1816, and made between the plaintiff, as ship's husband of the ship *Elizabeth*, then

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lying at *Havre de Grace*, of the one part, and the defendants, of the other part, the plaintiff covenanted to take on board six pipes of brandy, at *Havre*, and to proceed therewith to *Terciera*, and there take on board a full cargo of fruit in boxes, or other goods, as the defendants (the freighters) might think fit to send alongside, and from thence to proceed to *London;* and that, in consideration of the completion of the voyage, the defendants agreed to pay the plaintiff freight, for the fruit, on certain terms in the charter-party specified, and on the brandy, at a certain rate therein also stipulated; and they guaranteed the ship a full cargo home; that, on the faith of the contract in the charter-party, the defendant, *Walton*, proceeded to *Terciera*, and there contracted for a quantity of fruit, for which the merchants there agreed to receive the six pipes of brandy in barter; that *Walton* remained at *Terciera*, ready to ship, until the 14th *April*, 1817, when he received a letter from the master, stating that the ship was arrived, and at an anchorage for the delivery of her ballast and reception of cargo, agreeably to the charter-party; that *Walton* wrote to the master in reply, stating that as soon as the brandy was delivered, he was prepared to give a full cargo; but that, the plaintiff having neglected to purchase or ship the brandy, the merchants with whom the defendants had contracted for the supply of the fruit, refused to furnish it; and that, in consequence of the non-arrival of the brandy, the defendants were unable to procure any other fruit or cargo in the place thereof; that, the ship having returned to *England* in 1817, the defendants commenced an action against the plaintiff, for the loss they had sustained by the breach of his covenants in the charter-party; that, proceedings in equity being advised, a commission was issued to examine witnesses at *Terciera;* and that, great delay having taken place in the execution and return thereof, the action was never decided, but that the same was pending up

to the time of the decease of the plaintiff, which happened in *March*, 1827; that, shortly after the commencement of the defendants' action against the plaintiff, the present suit was commenced upon the charter-party, against the defendants, in the name of the plaintiff, for the freight of the vessel; and that judgment was given against them, after argument on demurrer to the declaration (*a*), on which a writ of inquiry was executed, and the damages and costs assessed at 418*l.* 8*s.*, for which sum the defendant *Rondeau* was, in *May*, 1820, taken in execution on a writ of *capias ad satisfaciendum*, directed to the sheriff of *Surrey*, in whose custody he remained until the 13th *January*, 1825, when he was removed by a writ of *habeas corpus* to the custody of the Marshal of the *King's Bench*, where he has ever since been confined; that the defendant *Rondeau* had since discovered that the plaintiff had no interest whatever in the charter-party, or in this action; but that the owners of the vessel, and the parties really interested, were Messrs. *Attwood* and others, and that the plaintiff, under their directions, sent private instructions to the master of the vessel, whilst at *Havre*, not to buy the brandy; and that, in consequence of its non-delivery, the contracts for the fruit became forfeited, whereby the defendants sustained a great loss; that a commission of bankrupt was issued against the plaintiff, in *March*, 1822, and that, on his last examination, he admitted that he had not any interest in the charter-party or vessel, or in the freight, or in the damages recovered in this action, and that he was indemnified by Messrs. *Attwood* and others, the owners of the vessel; that the plaintiff's name was made use of for mere form, and that

(*a*) See *Fothergill* v. *Walton*, 2 B. Moore, 630, where the Court gave judgment for the plaintiff, on the ground that the covenant by him to take the brandy to *Terceira* was an independent covenant, and not a condition precedent, as it went only to a part of the consideration of the contract.

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he, in his life-time, much regretted the imprisonment of the defendant *Rondeau*, and expressed his readiness to liberate him, but that he had not the means of so doing; that the plaintiff died intestate, and that letters of administration had been granted to his widow, who, as well as the assignees under the plaintiff's commission, disclaimed all right, title, claim, or interest, in the charter-party, or to the damages recovered in this action; that the defendants were, and had been at all times, ready to allow the plaintiff, or the owners of the vessel, credit in account for the damages recovered in this action, against the damages they had sustained; that the defendant *Rondeau* had been confined in prison in this action, from the 18th *May*, 1820, to the present time, being a period of nearly *eight* years; that he was *seventy-six* years of age, and had been nearly ruined in consequence of the above proceedings having been taken against him.

Under these circumstances, the learned Serjeant submitted that *Rondeau* was entitled to his discharge, as the plaintiff, in his life-time, had acknowledged that he had no interest in the charter-party, or in the damages recovered in the action; but that he was indemnified by the owners of the vessel. He, therefore, sued the defendants as a mere trustee, and, as the assignees and the administratrix, have, since his bankruptcy and death, disclaimed all interest in the charter-party, or in the damages recovered in the action, there can be no pretence for detaining the defendant any longer in custody. In *Broughton* v. *Martin* (*a*), the Court discharged out of custody a defendant who had been in execution at the suit of a plaintiff some time since deceased, no will having been proved, nor any administration granted, and the deceased's family having, on notice of a motion for the discharge of the defendant, declined to interfere. So, in *Parkinson* v.

(*a*) 1 Bos. & Pul. 176.

Horlock (*a*), the Court discharged a defendant from execution, six months after the plaintiff's death, it appearing that the next of kin did not intend to take out administration. And here, as the administratrix has disclaimed all interest in the action, it must be considered in the same light as if she had not administered.

Mr. Serjeant *Wilde* now shewed cause.—Although the administratrix, and the assignees of the plaintiff, have disclaimed all interest in the suit, or in the damages awarded to the plaintiff in his life-time; yet the administratrix had clearly a legal right, and might discharge the defendant if she had thought proper; but, as she has not done so, the Court cannot interfere. This case is distinguishable from those of *Broughton* v. *Martin*, and *Parkinson* v. *Horlock*; for, in those cases, there were no personal representatives of the deceased plaintiffs, and the next of kin had expressly declined to interfere, or said that they did not intend to administer to the effects. Besides, the defendant in this case might be relieved, either by being brought up under the Lords' act, or by applying to be discharged under the Insolvent Debtors' act, to which he would be entitled, on giving up his property to his creditors.

Mr. Serjeant *Lawes*, and Mr. Serjeant *E. Lawes*, in support of the rule. The plaintiff in this suit sued as a mere trustee for the owners of the vessel, and had no interest in the charter-party on which the action was founded, or in the damages awarded by the judgment. The suit was abated by the plaintiff's death, and although his widow administered to his effects, still she has not only forborne to interfere, but has positively disclaimed having any interest in this suit; nor has she offered to oppose the defendant's discharge. The assignees could only be entitled to interfere

(*a*) 2 New Rep. 240.

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on equitable grounds, and must, therefore, be considered only as third parties. In *Bauerman* v. *Radenius* (*a*), the declarations of the plaintiff on the record were admitted in evidence for the purpose of defeating the action, although he was only a trustee for a third person; and here, as the plaintiff, in his life-time, admitted that he was a mere trustee for the owners, there can be no doubt as to the equity of the case: and, considering the great age of the defendant, and the length of his imprisonment, he is clearly entitled to the indulgence and commiseration of the Court.

Lord Chief Justice BEST.—Although an appeal has been made to the compassion of the Court, it cannot be indulged. There is a legal judgment against the defendant, upon which damages have been assessed, and for which he was charged in execution. Now, if there were no person to discharge him, the Court might interfere, as in the cases to which we have been referred. But, where there is a party who can discharge him, it is too much to require us to do so; and as he was legally taken into custody in the first instance, he must continue in custody until he be legally discharged. The plaintiff's widow, having administered to his effects, is his legal representative, and, as such, may, if she think proper, discharge the defendant from his imprisonment. But we should be doing great injustice by interfering with her rights. Although, formerly, the Courts might be strongly inclined to afford relief to parties in custody, yet, since the Court for the relief of Insolvent Debtors has been established, every debtor may be discharged out of custody, on giving up his property to his creditors; and, if he will not do so, he is not a fit object of compassion, as he prefers remaining in prison, rather than satisfying his creditors their just and lawful demands. I,

(*a*) 7 Term Rep. 663.

therefore, should not be inclined to interfere in such a case, even if the Court had a discretion; but here we have none, the administratrix of the plaintiff having it in her option to give the defendant a legal discharge.

Mr. Justice PARK.—The cases to which we have been referred do not seem to me to apply. The widow of the intestate is his legal representative. Previously to his death, he had obtained a judgment against the defendant, under which the latter was duly charged in execution. The administratrix, therefore, has a right to detain the defendant on such judgment, and may exercise her discretion in discharging him. In *Broughton* v. *Martin*, the relatives of the deceased declined to interfere; and in *Parkinson* v. *Horlock*, they expressed their intention not to take out administration. The case of *Dunsford* v. *Gouldsmith* (*a*), appears to me to be precisely in point. There, the Court refused to discharge out of custody a defendant in execution at the suit of the plaintiff, although the application was not made until eighteen months after the plaintiff's death, it appearing that he had appointed executors who were alive at the time of the application, but had not assented to the discharge. No valid distinction can be drawn between the case of an executor, and that of an administrator, in this respect. The case of *Bauerman* v. *Radenius* is altogether different, as there the question arose on the production in evidence of a letter from the plaintiffs, who were the shippers of goods, to *A. B. & Co.*, exculpating the defendant, and stating that he had acted according to the plaintiffs' orders; but it appeared in the same letter, that *A. B. & Co.* were the persons on whose risk the goods were shipped, and that they were the persons really interested in the suit, and had indemnified the plaintiffs, their agents, in whose names they had brought the action. Here, however, the

(*a*) 8 B. Moore, 145.

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owners were not parties to the charter-party, but the plaintiff alone; and the action was accordingly brought in his name. Although it has been said that it is an act of hardship and oppression to detain the defendant in prison, he having been so long incarcerated; yet, if he obstinately persevere in remaining there, we ought not to interfere; for he has his remedy by applying to the Insolvent Debtors' Court for relief.

Mr. Justice BURROUGH and Mr. Justice GASELEE concurring—

Rule discharged.

Saturday, May 17th.

HAWKES and Others, Assignees of DAY and Others, Bankrupts, *v.* SALTER.

In an action against the drawer of a bill, which was presented for payment at *N.* on *Saturday*, and dishonoured, it was proved that the post always left *N.* at half past nine in the morning:—*Held*, that the holder had the whole of *Monday* to give the drawer notice of the dishonour.

The plaintiffs' clerk proved that the letter giving notice of the dishonour of the bill was copied by him on the *Monday* into a book kept for that purpose, and said, that, by the course of business at their house, all letters copied into that book were sent to the post-office in the evening of the day on which they were so copied, but that he himself did not carry the letter in question to the post, it being the duty of one of the other clerks to do so:—*Held*, not sufficient evidence that the letter was sent.

THIS was an action on a bill of exchange, for 125*l.*, drawn by the defendant, on the 7th *November*, 1826, upon and accepted by one *Joseph Calvert*, payable, three months after date, at Messrs. *Days'*, bankers, *Norwich*.

At the trial, before Lord Chief Baron *Alexander*, at the last Summer Assizes, at *Norwich*, it appeared that the bill became due on *Saturday* the 10th *February*, 1827, and was on that day presented at Messrs. *Days'* for payment, and was dishonoured; that *Calvert*, the acceptor, resided about a mile form *Norwich*, and that the defendant lived at *Swaffield*, a village near *North Walsham*, which latter place was about fourteen miles from *Norwich*, and that the post set out from *Norwich* to *North Walsham* every morning at half past nine o'clock. A clerk of Messrs. *Days* proved that the bill in question was presented at their banking house for payment, on the 10th *February*; that one of the plaintiffs wrote a letter to the defendant, the drawer,

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on *Monday*, the 12th *February*, giving him notice of the dishonour of the bill, which letter the witness copied into a book kept for that purpose; that he believed the letter was sent by the post from *Norwich* on *Tuesday* morning, the 13th *February*, but that he did not put it into the post-office himself; that there were two other clerks in the house, and that the course of business was, to put letters into the post on the evening of the day on which they were copied into the book; and that it was the duty of one of the other clerks to put such letters into the office: but neither of those clerks was called. For the defendant, it was objected, *first*, that the plaintiffs should have proved that the bill was presented to *Calvert*, the acceptor, as it was made payable at Messrs. *Days'* generally, and not there only (*a*); *secondly*, that there was no proof that the defendant, as drawer, had notice of the dishonour; and *lastly*, that, even if he had, it was not sent in due time, as the letter containing it should have been forwarded from *Norwich* by the *Monday's* post; and that there was not sufficient evidence that the letter had ever been put into the post-office at *Norwich*, as the clerk who copied it merely said that he supposed it was sent on the morning of the 13th. The Jury found a verdict for the plaintiffs, and the learned Judge gave the defendant leave to move to set it aside, and enter a nonsuit, in case the Court should be of opinion that either of the above objections was well founded.

Mr. Serjeant *Storks*, in the last *Michaelmas* Term, accordingly obtained a rule *nisi*; and, in support of the latter objection, relied on the case of *Hetherington* v. *Kemp* (*b*), where it was held, that it is not sufficient *primâ facie* evidence of a letter being sent by the post, that it was written by a merchant in his counting-house, and put down upon a table for the purpose of being carried from thence to the

(*a*) See the statute 1 & 2 *Geo.* 4, c. 78. (*b*) 4 Camp. 193.

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post-office, and that, by the course of business in the counting-house, all letters deposited on that table were carried to the post-office by a porter.

Mr. Serjeant *Spankie* now shewed cause. There was abundant evidence to go to the Jury, that the letter was put into the post-office at *Norwich*, on the evening of the 12th *February*, or before the post left on the morning of the 13th. The clerk who copied it, said, that the course adopted by the banking house was, to put such letters into the post on the evening of the day on which they were copied; and, although he did not put it into the post-office himself, yet he assigned as a reason, that it was the duty of one of the other clerks to do so; and when the letter was copied in the book, the witness had done his duty, by putting it in a train to be forwarded in due course by the next post. In *Hetherington* v. *Kemp*, the evidence was, that a porter was in the habit of carrying the letters from the plaintiff's counting-house to the post-office; and Lord *Ellenborough* said: "Had you called the porter, and he had said, that, although he had no recollection of the letter in question, he invariably carried to the post-office all the letters found upon the table, this might have done." Here, however, there was no porter to convey letters from the banking-house; and, as the clerk who copied the letter in question said, that he had no doubt but that it was sent in due course, it was sufficient. At all events, the bankers had the whole of *Monday* to give the defendant notice of the dishonour of the bill, as it was presented for payment on a *Saturday*, and *Sunday* being a *dies non*; and if the letter containing the notice were put in the office before the post left *Norwich* on the *Tuesday* morning, it was early enough, there being no post on *Monday* night. In *Bray* v. *Hadwen* (*a*), it was decided, that a country banker, with whom a bill of exchange, pay-

(*a*) 5 Mau. & Selw. 68.

able in *London*, is deposited, has an entire day after receiving notice of its dishonour, to transmit the same to his customer; so that notice by the *next day's* post, though it be not the *next post*, will be time enough: therefore, where the indorsee of such bill deposited it with his bankers in the country, who caused it to be duly presented for payment on the 14th *July*, when it was dishonoured, and notice was sent by the post to the country bankers on the 15th, which reached them on the morning of the 17th (being *Sunday*), and they on the next day sent notice by the post to the indorsee, but not before twelve at noon, at which time the post set out for the place where the indorsee resided—it was held, that the notice was within time; and Lord *Ellenborough* there stated it to be laid down as a rule of practice, that each party into whose hands a dishonoured bill may pass, should be allowed one entire day for the purpose of giving notice. So, here, as the bill was presented on *Saturday*, the bankers had the whole of *Monday* to give notice of its dishonour to the defendant; and it would have been sufficient for them to have put the letter in the post at any time before it set out on the *Tuesday* morning (*a*).

Mr. Serjeant *Storks*, in support of his rule.—Whether or not the bankers had the whole of *Monday* to give the defendant notice that the bill had been dishonoured by *Calvert*, the acceptor, is immaterial, as the bill should have been presented to the latter for payment; for, although it was made payable at Messrs. *Days'*, yet the statute 1 & 2 *Geo.* 4, c. 78 enacts, that such an acceptance shall have the effect of a general acceptance (*b*). The mere presentment at the banking-house was nugatory, or at least not a sufficient presentment to the acceptor,

(*a*) See *Williams* v. *Smith*, 2 Barn. & Ald. 496; *Wright* v. *Shawcross*, Id. 501, n.

(*b*) See *Turner* v. *Hayden*, 4 Barn. & Cress. 1.

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to charge the defendant as drawer. At all events, there was no evidence that the letter containing the notice of dishonour, had been put into the post before it set out on the *Tuesday* morning. The person who put it in should have been called to prove that fact.

Lord Chief Justice BEST.—We are all of opinion that there was not sufficient evidence that the letter containing the notice of the dishonour of the bill in question, was put into the post before it left *Norwich* on the *Tuesday* morning. But it would be unjust to nonsuit the plaintiffs on that ground; and we think that justice will be done to all parties, by granting a new trial on payment of costs. The bill was presented to the bankers for payment on a *Saturday*. They could do nothing either on that day or the following (being *Sunday*); nor were they bound to send the letter containing the notice of dishonour by the post on *Monday* morning, according to the authority of *Bray* v. *Hadwen*. If the plaintiffs had proved that the letter was put into the office before the mail started on the *Tuesday* morning, it would have been sufficient; but there was no satisfactory evidence of that fact. If the cause go down again, they may be enabled to prove it. On payment of costs, therefore, the rule for a new trial must be made—

Absolute.

Monday, May 19th.

PHILPOT *v.* BRIANT.

A mere delay by the holder of a bill of exchange to sue the acceptor, does not discharge the drawer or indorsers, the right to sue not being suspended. Therefore, where the executrix of a deceased acceptor verbally promised the holder to pay the bill out of her own private income, and the latter agreed to give her time, provided interest were paid, and accordingly forbore to sue:—*Held*, that the drawer was not thereby discharged; the promise by the executrix being void, and the holder being under no binding engagement to give her time.

THIS was an action brought by the plaintiff, as second indorsee, against the defendant, as drawer, of a bill of ex-

change, upon and accepted by the father of the latter. The first count of the declaration stated, that, on the 16th *September*, 1822, the defendant drew a certain bill of exchange, and directed it to one *John Briant*, requiring him, six months after the date thereof, to pay to the defendant's order 300*l*. The plaintiff then averred, that the defendant indorsed the bill to one *Alexander Clark*, who indorsed it to the plaintiff; that, when the bill became due, to wit, on the 19th *March*, 1823, it was in due manner shewn and presented to the said *John Briant* for payment thereof, and refused: of which the defendant had notice, and thereby became liable to pay its amount to the plaintiff. The second count was, like the first, omitting the indorsement by the defendant to *Clark*. To these were added the usual money counts. Plea—*Non assumpsit*.

At the trial, before Mr. Justice *Park*, at *Guildhall*, at the Sittings after the last *Michaelmas* Term, the clerk of a notary proved, that, on the day the bill became due, *viz.* on the 19th *March*, he presented it for payment at No. 18, *Bishopsgate Street*, the drawee having accepted it payable at that house; and that he was told that there were "no effects." It was then proved that *John Briant*, the acceptor, died about a fortnight before the bill became due, *viz.* on the 6th *March*, leaving his widow his executrix. On the brother of the defendant being called as a witness, he stated that his father, the acceptor, left considerable property, more than sufficient to pay all debts and incumbrances on his estate; that his mother was his father's executrix, and that he, the witness, acted for her; that he had had several conversations with the plaintiff respecting the bill in question; and that, about twelve months after it became due, the plaintiff sent a letter to his mother, requesting to know when he might expect payment; that, in consequence, the witness called on him, and told him that there was not then sufficient personal property to pay the

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bill, but that, if he would let the matter stand over, his mother would engage to pay the bill out of her own private income; to which the plaintiff replied, that, provided the interest were regularly paid, he would give a reasonable time; and that the interest had since been, in pursuance of that agreement, regularly paid out of the private income of his mother, the executrix.

For the defendant, it was objected, that the plaintiff could not be entitled to recover, on *three* grounds;—*first*, that the declaration was not sufficient, as the plaintiff had not averred that the bill was presented to the drawee for acceptance, or that he had accepted it, but merely that it was presented to him for payment;—*secondly*, that, the acceptor being dead before the bill became due, the averment in the declaration, that it was presented to him, could not be sustained; or that, at all events, it was incumbent on the plaintiff to prove that it had been presented for payment to the executrix;—and *lastly*, that, as the plaintiff had consented to give time for payment to her, without the knowledge or consent of the defendant as drawer, the latter was thereby discharged. The learned Judge, however, over-ruled the two first objections (*a*), and a verdict was taken for the plaintiff for the amount of the bill and interest then due, leave being reserved to the defendant to move the Court to set it aside, and that a nonsuit might be entered, in case they should be of opinion that the defendant was discharged from his liability as drawer of the bill, by the plaintiff's having agreed to give time for payment to the executrix of the drawee, on receiving the interest in the mean time.

Mr. Serjeant *Taddy*, in the last Term, accordingly obtained a rule *nisi*, against which—

(*a*) See 3 Carr. & Payne, 244.

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Mr. Serjeant *Wilde*, on a former day in this Term, shewed cause.—The conversation which took place between the plaintiff and the son of the deceased acceptor, although he acted on behalf of his mother, the executrix, did not preclude the former from recovering against the defendant as drawer of the bill. It must be admitted, that, if the holder of a bill enter into a contract with the acceptor, by which further time for payment is given to the latter, it will in general discharge the drawer. Here, however, the acceptor died before the bill became due, and on an application to his executrix for payment, her son said, that she had not then sufficient assets; on which the plaintiff agreed to wait a reasonable time, provided the interest on the bill was duly paid, which was accordingly done. But the plaintiff was not in a situation to proceed against the executrix, although she had engaged to pay the amount of the bill out of her own private funds, as there was no consideration for such an engagement on her part; and even if there were, it was void under the statute of frauds, as it was not proved to have been in writing. The plaintiff's promise amounted to a mere forbearance to sue the executrix on her paying interest on the bill; and the plaintiff might have sued her on the bill notwithstanding, and recovered out of the assets of her testator. As, therefore, there was no specific contract by the plaintiff to give time, but a mere forbearance to sue, and as the promise of the executrix was without consideration and void, and there was no binding engagement on the plaintiff not to sue the representative of the acceptor, the drawer's liability was not extinguished.

Mr. Serjeant *Taddy*, in support of the rule.—The agreement by the plaintiff, as holder of the bill, to give time for payment to the executrix of the acceptor, discharged the defendant as the drawer; for, if the remedy which the holder of a bill may have against the acceptor,

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be only suspended by an agreement between them, it is sufficient to discharge the drawer. Here, the remedy the plaintiff might have pursued against the executrix, was clearly suspended by the conversation which took place between him and her son; and, although she agreed to pay the interest out of her own income, yet it was in substance a promise to pay out of the assets of her testator: and, the plaintiff's having agreed to give a reasonable time for payment, and to forbear suing out proceedings, was a sufficient consideration for such promise. In *Rann* v. *Hughes* (*a*), it was decided, that the being indebted is of itself a sufficient consideration to ground a promise; and here, the executrix undertook, not to be answerable for the payment of the bill out of her own estate, but to pay the interest until she should receive assets from the estate of her husband. Such promise, therefore, need not have been in writing; and, as the plaintiff gave time in consequence of that undertaking, it is immaterial whether it were given on an adequate consideration or not. At all events, the legal effect of the undertaking by the executrix was, to pay the plaintiff out of the assets of her testator; and it was proved that he did not die insolvent, but, on the contrary, had left considerable property, and more than sufficient to pay all his debts and incumbrances. In *Tindal* v. *Brown* (*b*), it was held, that, if the holder of a bill give time to the acceptor after it has been dishonoured, the indorser is discharged; and Mr. Justice *Buller* there said (*c*): "As to giving time, the holder does it at his peril; for, in no case has it been determined that the indorser is liable after the holder of a note has given time to the maker;" and here, it appears that the remedy the plaintiff had against the executrix of the acceptor, was suspended for several years, he having died in 1823, and the present action not having been commenced until 1827; and, even if the holder had suspend-

(*a*) 7 Term Rep. 350, n. (*b*) 1 Term Rep. 167. (*c*) Id. 169.

ed proceedings only for a reasonable time, it would have operated to destroy the liability of the drawer of the bill.

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Cur. adv. vult.

Lord Chief Justice BEST now delivered the judgment of the Court, as follows:—

A creditor, by giving further time of payment, undertakes that he will not, during the time given, receive the debt from any surety of the debtor; for, the instant that a surety paid the debt, he would have a right to recover it against his principal. The creditor, therefore, by receiving his debt from the surety, would indirectly deprive the debtor of the advantage that he had stipulated to give him. If the creditor had received from his debtor a consideration for the engagement to give the stipulated day of payment of the debt, it would be injustice to him to force him to pay it to any one before the day given. If, to prevent the surety from suing the principal, the creditor refuse to receive the debt from the surety, until the time given to the debtor for payment by the new agreement, the surety must be altogether discharged, otherwise he might be in a worse situation than he was in by his contract of suretyship. If he were allowed to pay the debt at the time when he undertook that it should be paid, the principal debtor might have the means of repaying him. Before the expiration of the extended period of payment, the principal debtor might have become insolvent. A creditor, by giving time to the principal debtor, in equity, discharges the obligation of the sureties. A Court of equity will grant an injunction to restrain a creditor, who has given further time to the principal, from bringing an action against the surety. This equitable doctrine, Courts of law have applied to cases arising on bills of exchange. The acceptor of a bill of exchange is considered as the principal debtor. All the other parties to the bill are sureties that the acceptor shall pay the bill,

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if duly presented to him, on the day it becomes due, and, if he do not then take it up, that they, on receiving notice of its non-payment, will pay it to the holder. If the holder give the acceptor further time for payment, without the consent of the drawer or indorsers, he discharges them from all the liability that they contracted by becoming parties to the bill. But, delay in suing the acceptor will not discharge the drawer or indorsers, because such delay does not prevent them from doing that which, on receiving notice of non-payment by the acceptor, they ought to do, viz. paying the bill themselves. The time of payment must be given by a contract, that is binding on the holder of the bill. A contract without consideration is not binding on him. The delay in suing is, under such a contract, gratuitous. Notwithstanding such contract, he may proceed against the acceptor when he pleases, or receive the amount of the bill from the drawer or indorsers. As the drawer and indorsers are not prevented from taking up the bill by such delay, their liability is not discharged by it. To hold them discharged under such circumstances, would be to absolve them from their engagements without any reason for so doing. In the case of *The Arundel Bank* v. *Goble*, which is to be found in a note to *Chitty on Bills* (*a*), and the accuracy of which note is proved by my Brother *Burrough's* report to us of what passed at the trial of the cause before him, this point is decided. There the acceptor of a bill applied to the holders for indulgence for some months; they, in reply, wrote to the acceptor, informing him that they would give him the time that he required, but that they should expect interest: and on a motion for a new trial (*b*), the Court of *King's Bench* held, that, as no *fresh security* was taken from the acceptor, the agreement of the plaintiffs to wait was without consideration, and did not discharge the drawer. That is

(*a*) 5th Edit. 379, n. (*b*) See *Margesson* v. *Goble*, 2 Chit. Rep. 361.

a stronger case than the present. In this case there was no agreement for any particular time, nor any consideration for giving the time that was given to the acceptor. If the promise made by the executrix of the acceptor be considered to be a promise to pay the debt, with interest, out of the assets of the testator, it gives no claim to the holder beyond what the bill gave him. The executrix was, before that promise was made, bound to pay principal and interest out of the testator's effects. If it is to be taken to be a personal promise of the executrix, it is void under the statute of frauds, not being in writing. The holder, therefore, had no better security, nor any advantage beyond what the bill had given him.

We hesitated only in consequence of what fell from Mr. Justice *Buller* in *Findall* v. *Brown*. But, in that case, there was no notice, by the holder to the defendant, of the dishonour of the note. The opinion of Mr. Justice *Buller* is not the ground on which the Court gave judgment, and that opinion is overruled by the case in *Chitty*.

The rule for a nonsuit must be

Discharged.

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MACLEAN *v.* DUNN and WATKINS. *May 7th.*

Monday, May 19th,

A subsequent ratification by a principal of a contract by an agent is equivalent to a previous authority. Where, therefore, a broker made a contract in writing for the sale of goods, not being authorized by one of his principals at the time, which the latter afterwards assented to:—*Held*, that the broker was an agent duly authorised to bind his principal under the statute of frauds, at the time the contract was entered into.

A broker delivered to the vendor bought and sold notes, written on one sheet of paper, and the day for payment of the goods was inserted at the end of the bought note only, but in those made out for the purchasers, the day was inserted at the end of the bought *as* well *as* of the sold note:—*Held*, that, as the bought and sold notes delivered to the vendor were both written on one sheet of paper, the whole must be considered as forming one contract; and consequently, that there was no variance.

If a purchaser refuse to accept goods bargained for, the vendor may re-sell them, and recover against the purchaser the amount of the loss on such re-sale.

THIS was an action of *assumpsit*, brought against the defendants for not accepting and paying for a quantity of wools agreed to be purchased by them from the plaintiff. The first count of the declaration stated, that, before the making of the contract thereinafter next mention-

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ed, the plaintiff had bought of the defendants, and they had before then sold to him, a large quantity of *Spanish* wool, at and for a certain price or sum to be therefore payable from the plaintiff to the defendants, to wit, 2,683*l.* 5*s.*; that, afterwards, to wit, on the 28th *March*, 1825, the defendants bargained for and bought of the plaintiff, and the latter, at the request of the defendants, sold to them, a large quantity, to wit, sixty-six bags of *Russian* wool, containing 23,007 pounds weight, and ninety-nine bags of *German* wool, containing 37,630 pounds weight, at and for the rates and prices following, that is to say,—at and for the price or sum of 2*s.* 10*d.* for each and every pound weight contained in the said sixty-six bags of *Russian* wool, —at and for the price or sum of 3*s.* 2*d.* for each and every pound weight contained in three bags of the said *German* wool,—at 2*s.* 7*d.* *per* pound for three other bags of the said *German* wool,—at 3*s.* *per* pound for thirty-four other bags of the said *German* wool,—and at 3*s.* 3*d.* *per* pound for the residue of the said *German* wool; the whole amounting to a large sum, to wit, the sum of 9,690*l.*, to be delivered by the plaintiff to the defendants within a reasonable time then next following: and the price or value of the said one hundred and sixty-five bags of wool, at and after the rates aforesaid, after deducting the said sum of 2,683*l.* 5*s.* so due and payable from the plaintiff to the defendants for and on account of the said ninety bags of *Spanish* wool so bought by the plaintiff of the defendants, and so sold by them to him as aforesaid, to be paid at the time of the delivery thereof, either by an acceptance payable four months after date, the plaintiff in such case making an allowance to the defendants of a discount of 2*l.* 10*s.* for every 100*l.* of the amount thereof; or in cash, the plaintiff, in such case, making an allowance to the defendants of a discount of 5*l.* for every 100*l.* of the amount payable to the plaintiff by the defendants for and on account of the said one hundred and sixty-five bags of *Russian* and *German* wool, the plaintiff having the option between the two modes of payment

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The plaintiff then averred—that, in consideration thereof, and that he, at the request of the defendants, had undertaken and promised them to deliver the said one hundred and sixty-five bags of *Russian* and *German* wool to them, the defendants, within a reasonable time then next following, they undertook and promised the plaintiff to accept the said one hundred and sixty-five bags of wool of and from the plaintiff, and to pay him for the same, at the rate and in the manner aforesaid, on the delivery thereof to them, the defendants; that the plaintiff afterwards assented to be paid for the said last-mentioned bags of wool, in cash, of which the defendants had notice; that, although the plaintiff, within a reasonable time next following the making of the promise, was ready and willing, and tendered and offered, to deliver the said one hundred and sixty-five bags of *Russian* and *German* wool to the defendants, and requested them to accept the same; and was also ready and willing to suffer and permit the defendants to deduct from the price and value of the said last-mentioned bags of wool, the said sum of 2,683*l.* 5*s.* so due to the defendants from the plaintiff for and on account of the said ninety bags of *Spanish* wool so bought by the plaintiff of the defendants and by them sold to him as aforesaid, and to allow them a discount at and after the rate aforesaid, upon the price or value of the said one hundred and sixty-five bags of *Russian* and *German* wool so sold by the plaintiff to the defendants and by them bought of him as aforesaid; yet that the defendants did not nor would, at the said time when they were so requested as aforesaid, or at any time before or afterwards, accept the said one hundred and sixty-five bags of *Russian* and *German* wool, or any part thereof, from the plaintiff, or pay him for the same, but wholly refused and neglected so to do; and that, thereupon, afterwards, to wit, on &c., the plaintiff re-sold the said one hundred and sixty-five bags of *Russian* and *German* wool so remaining unaccepted by the defendants, and unpaid for by them, by public sale, at and for a

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much less and, to wit, the sum of 2,000*l.* less than the sum so agreed to be paid by the defendants for the same; and that thereby there was a deficiency upon such re-sale to the amount of the said sum of 2,000*l.*, over and besides the charges attending such re-sale, amounting to a further sum of 300*l.*, making together the sum of 2,300*l.*: of all which premises the defendants had notice.—There were five other special counts varying the terms of the contract, as to the quantities and prices of the wool. To these were added counts for goods bargained and sold, goods sold and delivered, and the usual money counts. The defendants pleaded the general issue.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after *Michaelmas* Term, 1826, it appeared that the plaintiff was extensively engaged in the wool and woollen trade, and resided in the city of *London*, and that the defendants carried on business there and at *Manchester*, as drysalters and oilmen, under the firm of *Dunn, Austin, Watkins, & Co.* That the defendant *Watkins* resided near *Manchester;* that, on the 21st *March*, 1825, one *Ebsworth*, a wool-broker, who was related to *Watkins*, being then at *Manchester*, entered into a treaty with the plaintiff's traveller, for the purchase by the plaintiff of a quantity of *Spanish* wool of the defendants, and for the sale to them of *Russian* and *German* wools by the plaintiff, and the following bought and sold notes were afterwards made out and signed by *Ebsworth*, and delivered by him to the plaintiff's traveller, in the presence of the defendant *Watkins*:—

"*Manchester*, 28th *March*, 1825.

"*D. Maclean*, Esq.

Sir,—We have sold for your account, to Messrs. *Dunn, Austin, Watkins, & Co.*, one hundred and sixty-five bags of *Russian* and *German* wool. [Here followed a specification of the wools, *viz.* sixty-six bags of *Russian*, twelve

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bags of *German* lamb, and eighty-seven bags of *German* wool]. After deducting the amount of ninety bags of *Spanish* wool sold you, the balance to be paid for by an acceptance at four months, with 2½ *per cent* discount; or in cash, with 5 *per cent* discount,—at your option.

Commission for selling, 1 *per cent.*

Ebsworth & Badham."

"*Manchester*, 28th *March*, 1825.

"*D. Maclean*, Esq.

Sir,—We have bought for your account, of Messrs. *Dunn, Austin, Watkins, & Co.*, ninety bags of *Spanish* wool. [Here followed a specification of the wools]. The amount of the ninety bags to be deducted from the one hundred and sixty-five bags of *Russian* and *German* wool bought of you this day, and the balance to be paid for by an acceptance at four months, with 2½ *per cent.* discount; or in cash, with 5 *per cent.* discount, *on the* 1st *July*,—at your option.

Commission for purchasing, ½ *per cent.*

Ebsworth & Badham."

These notes were written on one sheet of paper, the sold note being on the one side, and the bought note on the other; and corresponding bought and sold notes were made out and signed by *Ebsworth* for the defendants; in which the 1st *July* was specified as the day for cash with 5 *per cent.* discount, at the end of the sold note as well as at the end of the bought note; but it did not appear that the last-mentioned notes had ever been delivered to either of the defendants.

Ebsworth, who was called as a witness, stated, that these notes were entered by his clerk in a book called a contract book, but which was not signed by the witness; and he also stated, that he shewed the entry to the

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defendant *Watkins* on the day the contract bore date, *viz.* the 28th *March*, 1825; that *Watkins* assented to it, provided the confirmation of the defendant *Dunn* could be obtained; that *Ebsworth* came to town in the beginning of *April*, and shewed the copy of the bought and sold notes to *Dunn*, who approved of them, and desired *Ebsworth* to go back to *Manchester* and proceed with the purchases; but that, shortly afterwards, *viz.* on the 19th *April*, *Dunn* told *Ebsworth* that he would have nothing to do with the contract; which he, *Ebsworth*, communicated to the plaintiff. Notwithstanding this, the plaintiff, on the 19th *May*, wrote a letter, addressed to the defendants jointly, at *Manchester*, desiring to know whether they would appoint any person to superintend the weighing off the wools sold to them, and requesting that the ninety bags bought of them against the above, might be weighed off and delivered to him. To this letter the defendant *Watkins* replied on the 22d, referring the plaintiff to *Ebsworth*, who was then at *Leeds*. On the 18th *June*, 1825, the plaintiff wrote to the defendants, stating that he had delivered twenty-four bags of the wool to *Ebsworth*, on account of the defendants, being part of the parcel sold them *per* contract of the 28th *March* last. On the 24th *June*, *Ebsworth* addressed an order to the plaintiff to deliver eighteen bags to *Williamson & Jones*, and, on the 21st of the same month, *Ebsworth* applied to the plaintiff, in the name of the defendants, for fifty bags more, for which an order was accordingly obtained, and indorsed to *Williamson & Jones*, who afterwards disposed of the whole of the sixty-eight bags, and received the money for them. On the 6th *July* following, the defendant *Watkins* told the plaintiff's traveller that the plaintiff had done right in delivering these wools to *Ebsworth's* order; and, on the 21st *July*, the plaintiff wrote a letter, addressed to the defendants at *Manchester*, inclosing the invoice of the one hundred and sixty-five bags of wool, and requesting payment for the same, after giving them credit for the amount of the ninety

bags of *Spanish* wool sold by them to the plaintiff. No answer having been returned to this letter, the plaintiff, on the 29th *August*, sent a notice to the defendants' counting-house in *London*, stating that his clerk would attend on the following day, for the purpose of delivering the remaining portion of the wools, on their paying for the same, agreeably to contract: and, on the 17th *October*, he gave them notice, that, unless the account was finally liquidated on or before the 1st *November* then next, he, the plaintiff, would cause the wools still remaining undelivered to be put up to public sale, and would sell the same for the defendants' account, appropriating the proceeds to the liquidation of their debt; and that he, the plaintiff, should hold them responsible for any balance that might remain due to him after the appropriation of such proceeds. No attention having been paid to this notice, the wools were sold by auction at a loss of between 2,000*l.* and 3,000*l.*; on which the present action was commenced.—For the defendants it was objected:—*first*, that there was no valid contract between them and the plaintiff, as *Ebsworth*, the broker who acted for both parties, neither signed his name in the contract-book, nor delivered the bought and sold notes to either of the defendants;—*secondly*, that, *Ebsworth* having no authority from *Dunn* at the time of making the contract, he was not an agent duly authorized within the meaning of the statute of frauds (*a*);—*thirdly*, that there was a material variance between the bought and sold notes delivered to the plaintiff and those made out for the defendants; as, in the former, the words "*on the 1st July*" were written at the end of the bought note only, whilst in the latter these words were written at the end of the sold note as well as of the bought note:—and, *lastly*, that the plaintiff had rescinded the contract by re-selling

(*a*) 29 Car. 2, c. 3, s. 17.

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part of the wools by auction, without the consent of the defendants. His Lordship left it to the Jury to say, whether or not the testimony of *Ebsworth*, the broker, was entitled to credit, and whether the defendant *Dunn* had or had not adopted the contract made by the former in his character of broker. The Jury found in the affirmative, and accordingly gave a verdict for the plaintiff, leave being reserved to the defendants to move to set it aside, in case the Court should be of opinion that either of the objections taken at the trial was well founded.

Mr. Serjeant *Taddy*, in the last Term, accordingly obtained a rule *nisi* that this verdict might be set aside and a nonsuit entered, or a new trial granted; and, in support of the latter, he produced several affidavits tending to impugn the character of *Ebsworth*.

Mr. Serjeant *Wilde* and Mr. Serjeant *Russell*, on a former day in this Term, shewed cause.—Taking all the documents together, *viz.* the bought and sold notes, and the entry in *Ebsworth's* book, there was a valid contract between the plaintiff and defendants, by which both parties were bound; and, whether or not *Ebsworth* had any authority from *Dunn* at the time of the contract, or whether the latter did not afterwards recognize or adopt it, has been set at rest by the finding of the Jury. Although the bought and sold notes made out for the defendants were not delivered to them, yet they were signed by *Ebsworth* as the broker for both parties; and there can be no doubt but that he was fully authorized by the defendant *Watkins* to make the contract; and *Dunn* afterwards assented to and adopted it, which assent and adoption are equivalent to a previous authority. *Ebsworth* was not only the agent of both parties for the purpose of making the contract, but also for carrying it into execution; so, he was not only

empowered to receive the wools, but to sell and deliver them to third parties, he having actually sold sixty-eight bags to Messrs. *Williamson & Jones*.—With respect to the variance between the respective bought and sold notes, as those delivered to the plaintiff were written on one sheet of paper, the words "the 1st of *July*," at the end of the bought note, apply to, and must be incorporated with and control, the contract as stated in the sold note; and, as the whole must be taken to be one memorandum, it is quite sufficient, and there was no necessity to repeat these words at the foot of the sold note. It has been said that the plaintiff rescinded the contract by the re-sale of part of the wools without the assent of the defendants; but he was under the necessity of doing so, as the defendants refused to accept them. It may be contended, that a part acceptance of goods cannot operate to take a case out of the statute; yet, when goods are ponderous and bulky, they need not be all delivered at one and the same time. An acceptance of a part at any period subsequent to the contract, is sufficient; and, if an unequivocal act of control be exercised over the part delivered, it is equivalent to an acceptance of the whole. The case of *Chaplin* v. *Rogers* (*a*) establishes the principle, that, if a purchaser deal with a commodity as if it were in his actual possession, as, by sale of part to another, this will supersede the necessity of proving an actual delivery. In *Hinde* v. *Whitehouse* (*b*) it was held, that the delivery to, and acceptance by, the purchaser, of samples of sugars, and which delivery was made as part of the article purchased, took the case out of the operation of the statute. So, here, the sale and delivery of the sixty-eight bags of wool by *Ebsworth* to *Williamson & Jones*, with the assent

(*a*) 1 East, 192. (*b*) 7 East, 358.

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of the defendants, amounted to a transfer of the whole. Although in *Cooper* v. *Elston* (*a*) it was decided, that a sale of goods by sample in one place, to be afterwards delivered at another, was within the statute, if no part of the goods contracted for were delivered; yet Lord *Kenyon* there observed, that the case expressly stated that the sample was no part of the goods contracted to be delivered.—It has been insisted that *Elsworth* was not authorized by *Dunn* to act as his agent at the time of the contract; but such authority may clearly be presumed from his subsequent adoption and assent. It is a well known and established maxim, that *omnis ratihabitio retro trahitur, et mandato æquiparatur:* and in *Ward* v. *Evans* (*b*) it was held, that, if a master send his servant to receive money, and the servant, instead of money, take a bill, and the master, as soon as told thereof, disagree, he is not bound by this payment; but that acquiescence, or any small matter, will be proof of the master's consent, and will make the act of the servant the act of the master. So, in *Boulton* v. *Hillisden* (*c*), a merchant's apprentice drew a promissory note, *viz.* "I promise to pay a certain sum for my master;" and it was held, that, in order to charge the master with the note, there ought to be either an authority precedent, or a consent subsequent. An entry by an agent to avoid a fine, is rendered valid and sufficient by a subsequent adoption; and no distinction can be drawn between an agent under the statute of frauds, and a general agent. The case of *Kinnitz* v. *Surry* (*d*) is an express authority to shew that Lord *Ellenborough* considered a subsequent act of adoption to be sufficient to constitute an agent within the meaning of the statute.

(*a*) 7 Term Rep. 14.
(*b*) 2 Salk. 442.
(*c*) Comb. 450; *S. C.* 1 Ld. Raym. 224.
(*d*) Paley's Prin. & Agent, 2d Edit. 143, n.

The same principle was established by the Court of *King's Bench* in *Soames* v. *Spencer* (*a*), *viz.* that a subsequent ratification of a contract is equivalent to a prior authority; and that such contract, when ratified, is binding on the party, although it was originally made without his authority. If, therefore, a prior authority may be presumed from a subsequent assent, the Jury having in this case found that *Dunn* assented to the contract made by *Ebsworth*, it operates as an adoption of such contract, and is consequently binding on all the defendants.—With respect to the re-sale by the plaintiff of the remainder of the wools, it cannot have the effect of rescinding the contract, or preclude him from recovering damages from the defendants for the non-performance or breach of their part of it; though it might have been an answer to an action for goods bargained and sold. In *Mertens* v. *Adcock* (*b*), a re-sale was held to be no bar to an action by the vendor, although it might perhaps be considered as a wrongful conversion. It seems from the case of *Hagedorn* v. *Laing* (*c*), that, after a re-sale of goods by the vendor, on default made by the purchaser, he cannot recover against him for goods bargained and sold; the Court, however, did not decide on that ground, but on the fact that there was a particular contract; and that, even if it were a contract of bargain and sale, it was subject to a condition, *viz.* that, if the purchaser did not take the goods within a certain time, the seller might rescind the contract; and that, if he re-sold, he shewed his dissent to the contract of bargain and sale. Although the case of *Greaves* v. *Ashlin* (*d*) may be said to establish the principle, that, notwithstanding the purchaser of goods neglect, after notice, to carry them away, the seller has no right on that account to re-sell them; yet, Lord *Ellenborough* said: "If the buyer does not carry away

(*a*) 1 Dow. & Ryl. 32.
(*b*) 4 Esp. Rep. 251.
(*c*) 6 Taunt. 162.
(*d*) 3 Camp. 426.

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the goods bought within a reasonable time, the seller may charge him warehouse-room; or, he may bring an action for not removing them, should he be prejudiced by the delay;" and there, the purchaser had a verdict for the difference between the price at which he bought the goods, and the sum for which they were re-sold. So, notwithstanding in *Hore* v. *Milner* (*a*) it was held, that, after a re-sale, the vendor could not bring an action for goods bargained and sold; on the ground that, by the re-sale, he had abandoned his right to insist on the purchaser's taking the goods, and had not considered them as his property, or the contract as completed; yet Lord *Kenyon* said, that the seller could, therefore, only recover damages for the breach of the agreement; and, as there was no count in the declaration applicable to that part of the case, his Lordship directed a nonsuit. Here, however, the plaintiff seeks to recover the damages sustained by him on account of the deficiency arising from the re-sale of the wools, and the declaration is framed accordingly; and, as the contract was not completed through the defendants' neglecting or refusing to take the residue of the wools, after an acceptance of a part, the plaintiff was not only justified in re-selling the part undelivered, but is also entitled to recover the deficiency arising from the re-sale.—At all events, there is no ground for a new trial, as the question as to the credit due to *Ebsworth* was most fully and properly left to the Jury; and their verdict is conclusive on that point.

Mr. Serjeant *Taddy* and Mr. Serjeant *Spankie*, in support of the rule.—This case involves principles of great importance in point of law, as well as to commercial interests; and although the defendant *Watkins* might have assented to the terms of the contract made by *Ebsworth*, still it cannot have the effect of binding the

(*a*) Peake's Ni. Pri. Cas. 3d Edit. 58.

other defendants, as it was not made with them as partners in the business of dry-salters and oilmen; and there was no evidence to shew that they were partners in the wool trade. But, independently of this, there was no valid contract to bind the defendants. In *Grant* v. *Fletcher* (*a*), a broker having made a contract, entered it in his book, but did not sign it; he afterwards signed and delivered bought and sold notes to the contracting parties, which differed from each other—that delivered to the defendants not mentioning the names of the buyers, and that delivered to the plaintiffs not specifying the commodity sold; and Lord Chief Justice *Abbott* said: "The broker is the agent of both parties; and, as such, may bind them by signing the same contract on behalf of buyer and seller. But, if he does not sign the *same* contract for both parties, neither will be bound. The entry in the broker's book is, properly speaking, the original, and ought to be signed by him." In the present case, that was not done, and the bought and sold notes delivered to the plaintiff differed materially from those made out for the defendants, which were not delivered to them, but remained in the possession of *Ebsworth* until after the present action was commenced. It was the duty of *Ebsworth* to make the contract so as to be binding on both parties; and, as the bought and sold notes varied in terms, the entry by *Ebsworth* in his contract-book will not supply the defect. In *Powell* v. *Divett* (*b*), a material alteration in a sale-note by the broker, after the bargain made, at the instance of the seller, without the consent of the purchaser, was held to annul the instrument so as to bar the seller. In *Cumming* v. *Roebuck*, Lord Chief Justice *Gibbs* said (*c*): "If the broker deliver a different note of the contract to each party contracting, there is no valid contract. Each is

(*a*) 5 Barn. & Cress. 436.
(*b*) 15 East, 29.
(*c*) Holt's Ni. Pri. Cas. 173.

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bound by the note which the broker delivers; and, if different notes are given to the parties, neither can understand the other."—The next question is, whether *Ebsworth* had any authority from the defendant *Dunn* to make the contract in question on his behalf, or whether he can be considered as an agent duly authorized within the meaning of the statute of frauds. The authority given him by *Watkins* was merely conditional, *viz.* in case the assent of *Dunn* could be obtained; but, in order to make the contract binding on both the defendants, *Ebsworth* should have been clothed with the authority of all at the time, the words of the statute requiring "a note or memorandum of the bargain to be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized;" which must necessarily apply to an agent authorized at the time of the contract. Admitting the maxim, that *omnis ratihabitio retro trahitur, et mandato æquiparatur*, yet the *mandatum* must be in writing, in order to bring a case within the meaning and operation of the statute. If an agent has authority at the time of the contract, his signature is binding on his principal; but a subsequent ratification by the latter cannot supply the want of authority at the time of the bargain, without which the signature by the agent would be a mere nullity. Here, *Dunn* might have rejected the agency of *Ebsworth* at any time before the contract was begun to be carried into effect; and he actually did so before any of the wools were sold or delivered to *Williamson & Jones*. This case, therefore, is distinguishable from *Kinnitz* v. *Surry*, as there the buyer acted upon the authority of the agent, and thereby adopted his act. So, in *Soames* v. *Spencer*, both parties assented to, and ultimately ratified the contract. Although it may be said that an adoption or recognition of the acts of an agent after contract made, may be sufficient to satisfy the terms of the statute, yet such contract cannot be binding on the party sought to be

charged, unless he authorized the signature by the agent at the time he entered into the contract on his behalf. At all events, the re-sale by the plaintiff of the wools undelivered, amounted to a rescinding of the original contract. No man can be justified in selling the goods of another; and, as the plaintiff has sued the defendant for a breach of the contract under which the wools were sold to them, it must be assumed that the property passed to them as the vendees. In *Mertens* v. *Adcock*, the plaintiff purchased goods at an auction; and Lord *Ellenborough* said, "as soon as the lot was knocked down to him, he became the buyer: they were goods bargained and sold." Unless, therefore, in the case of an express contract, as a sale by auction, or the goods sold are of a perishable nature, the vendor cannot be justified in re-selling them; and, if he do so, he is thereby precluded from suing the vendee for a breach of contract. In the contracts made by the *East India* Company, the power of re-sale is expressly provided for by the conditions of sale. The case of *Greaves* v. *Ashlin* is expressly in point. There, there was a written contract for the sale of oats, and no time was specified for the delivery. A week after the contract, the seller gave the purchaser notice, that, if they were not carried away immediately, he should re-sell them to other persons; and he accordingly did so; but Lord *Ellenborough* held, that the notice given to fetch away the oats could not discharge the seller from his contract, nor empower him to sell the property of the purchaser. So, here, the plaintiff could not put an end to the contract; nor was he justified in re-selling the wools undelivered, without having obtained the previous assent of both the defendants so to do.—At all events, as the testimony *Ebsworth* gave at the trial has been since contradicted in many points by several affidavits, it is but just to all parties that the cause should be reconsidered in this respect.

Cur. adv. vult.

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Lord Chief Justice BEST, now said:—A motion has been made in this case, for a nonsuit, or a new trial. The former resting on points reserved by me at *Nisi Prius*, the latter, on affidavits tending to impeach the credit of *Ebsworth*, the broker, by whom the original contract was made. The degree of credit due to his testimony, and also the fact of his being authorized by the defendants to make the contract on their part, were expressly left to the Jury. There can be no doubt but that he had authority from *Watkins;* and although it has been said that it was conditional only, yet as *Ebsworth* swore that it was afterwards assented to by *Dunn*, the defendants should have been prepared to contradict that assertion at the trial. But *Ebsworth* expressly swore that, some time after the contract was made, *viz.* in the beginning of *April*, 1825, he called on *Dunn*, in *London*, and shewed him a copy of the bought and sold notes, and that he not only approved of, but requested him, *Ebsworth*, to go back to *Manchester* and proceed with, the purchases. That part of his testimony remained wholly uncontradicted, nor was there any attempt to impugn it. If the objection to his credit had been taken at the trial, his evidence might have been received with suspicion; but, as the verdict of the Jury is corroborative of the facts stated by him, and no objection was raised at the time, I am of opinion, that there is no ground for a new trial.—With respect to the nonsuit, several legal objections have been raised. *First*, that the subsequent adoption of the contract by the defendant *Dunn*, even assuming that he did so, will not take this case out of the operation of the statute of frauds; and, in support of this objection, we have been referred to the words of the act, which require "some note or memorandum in writing of the bargain, to be made and signed by the parties to be charged, or their agents thereunto lawfully authorized;" and it has been insisted that this means, that the agent should be invested with his authority *at the time of his*

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signing the contract or bargain. If that had been the intention of the Legislature, they would have so expressed themselves. But the language of the act does not shew such an intent. It merely requires some memorandum in writing to be signed by the parties to be charged, or by their agents thereunto lawfully authorized; leaving us to the rules of common law, to consider the mode in which the agent is to receive his authority, or at what time sanction is to be given to him by his principal, to make the bargain or sign the contract. In all other cases, a subsequent sanction or adoption is considered to have the same effect as a previous authority; or, in other words, that, as an authority may be presumed from previous employment in similar acts, so, the same presumption arises from subsequent acts of assent or acquiescence: and this is most aptly expressed by the well known maxim, that *omnis ratihabitio retro trahitur, et mandato æquiparatur.* I am clearly of opinion that the subsequent sanction or ratification of a contract signed by an agent, takes it out of the operation of the statute far more satisfactorily than an antecedent authority. In the case of a previous authority, the party must trust to his agent for a faithful execution of his duty; but, if the authority be given subsequently to the making of the contract, the principal knows all that the agent has done, and ratifies and confirms his acts. Without, therefore, the aid of any authority, I should have entertained no doubt on this point, on the ground that a subsequent recognition by a principal of the acts of his agent, is not only equivalent to, but more binding than, a previous authority existing only at the time of making the contract. But there are recent decisions which tend to confirm my opinion, and assist me in the view I have taken of this question. In *Kinnitz* v. *Surry* (*a*), which was an action of *assumpsit* for not re-

(*a*) Paley, 143, n.

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ceiving corn sold, it appeared that, by the course of the corn-market, the broker of the seller delivered a sample, and an order for the delivery of the corn to the buyer, who had till the next market-day to refuse it if he found the bulk to vary from the sample; and the buyer, having had the corn examined, refused to complete the contract:—on its being objected that there was no memorandum of the contract signed by the buyer or his agent, Lord *Ellenborough* was of opinion, that, if the buyer acted upon the order, which in that case he did, by sending his servant to examine the bulk upon the authority of the broker's order, that was such an adoption of the broker's agency, as made him agent for both parties, and his note sufficient within the statute. So, in *Soames* v. *Spencer*, where, *A.* and *B.* being jointly interested in a quantity of oil, *A.* entered into a contract for the sale of it, without the authority or knowledge of *B.*, who, upon receiving information of the circumstance, refused to be bound by it, but afterwards assented by parol, and samples were delivered to the vendees,—it was held, in an action against the latter, that *B.*'s subsequent ratification of the contract rendered it binding, and that it was to be considered as a contract in writing within the terms of the statute. That is an express decision of the Court of *King's Bench*, and appears to me to be in terms with the present, as it establishes the principle, that a subsequent ratification of a contract is equivalent to a previous authority; or, in other words, that a ratification of a contract by a principal relates back to the time when it was made by the agent; which, in this case, was, when the bought and sold notes were signed by *Ebsworth*, who acted as the broker for both parties.—*Secondly*, it has been said, that there is a material variance between the bought and sold notes delivered by *Ebsworth* to the plaintiff, and those made out by him for the defendants; as, in the former, the words "*the 1st of July*," were omitted at the end of the sold note: but that appears to

me to be unimportant, or, at all events, not so material an alteration as to avoid the contract between the buyer and seller. Where there is no *aggregatio mentium* on facts previously agreed on as to the particular terms of a contract, it must be acceded that a variance or alteration by the broker annuls the contract. But here, the bought and sold notes were written on the same sheet of paper, and were intended to apply to one and the same transaction. The paper containing the contract for the sale of the *Russian* and *German* wools, by the plaintiff to the defendants, and the purchase of the *Spanish* wools from the latter, formed one document. The contract was to operate by way of barter or exchange of wools; and corresponding bought and sold notes were accordingly made out by the broker, and ought to have been delivered to each of the contracting parties. The bought note delivered to the plaintiff has reference to the sold note; and both are precisely the same as those made out for the defendants, with the exception of the omission of the words "*the 1st of July*," at the end of the sold note. But, as those words are inserted at the end of the bought note, they must be taken to apply equally to the contract set out in the sold note, and as being the day on which the payment with *5 per cent.* discount was to be made.—It has been also objected, that there has not been such an acceptance of the wools agreed to be sold by the plaintiff to the defendants, as will take the case out of the operation of the statute of frauds; but on that point I decline giving any opinion. It is enough for me to say, that there was a sufficient contract in writing to bind both parties; and, if the subsequent ratification by *Dunn* constituted *Ebsworth* an agent, by relation, duly authorized at the time of the contract, as he made out for the defendants bought and sold notes corresponding in terms with those delivered to the plaintiff, his entering it in his contract book was not necessary to complete the contract; neither was it essential to its validity.

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Lastly, it has been contended that the plaintiff has rescinded the contract, or, in other terms, deprived himself of any right of action he might have had against the defendants for a breach of contract, by the re-sale of the wools which were not delivered to the defendants. But such sale did not take place until after the defendants had had due notice, that, unless the amount due to the plaintiff for the wools was liquidated before a given day, they would be put up to public sale; and that the defendants would be held responsible for any balance that might remain due. The sale was beneficial to both parties; and, if it had not taken place, the plaintiff might have been entitled to recover, to a far greater amount, as it was proved at the trial that the market was declining rapidly at the time. It has been admitted, for the defendants, that, if the commodity had been perishable, it might have been re-sold; but it does not appear that any exception has ever been made as to such commodities. Indeed, it is very difficult to say what may be considered perishable articles, and what not; or whether the articles may be deteriorated by change of fashion, or by use. It is, however, quite clear that price is perishable, if goods are not. This is proved by some late speculations in the commercial world, which eventually turned out to be mere gambling transactions, where we have seen the price of shares in public companies fluctuate daily, if not hourly. Property which might be considered as valuable on one day, might be worth little or nothing on the next; and, in that respect, there is no essential difference between one commodity and another. It is, therefore, a practice founded on good sense, that a person who has contracted for the sale of an article, may, when the party who agreed to purchase refuses to complete his bargain, re-sell it, and hold him responsible for the difference between the price obtained at such sale, and that originally agreed to be paid. The practice itself is evidence of the law, and we ought

not to act contrary to it, unless some authority be pointed out. But the cases to which we have been referred, do not appear to me to apply. If the vendor of goods insist on having from the purchaser the price at which he contracted to dispose of them, and he afterwards re-sell them, he cannot maintain an action for goods bargained and sold; as, in order to claim the price agreed to be given for them by the purchaser, he must continue to exercise a dominion over them. But, if he sue the purchaser for damages by reason of his refusal to perform or complete the contract, it is not necessary for him to keep dominion over the goods; he may allege that the vendee had entered into a contract for the purchase of certain articles, and that he refused to perform it, in consequence of which the goods were sold at a less price; whereby he had sustained a damage. In such a case, it is not necessary that the property should remain in the hands of the seller unchanged at the time he commences his action for damages for the breach of contract; nor is it necessary for him to allege that fact in his declaration. The practice of the commercial world is against it; neither can justice require it. In the case of a warranty of a horse, if it turn out to be unsound, the buyer may dispose of it; and, if he sell it at a loss, he may recover for the breach of warranty, notwithstanding the re-sale. It has been said, however, that a re-sale of goods by the vendor is a bar to an action against the vendee, except in the case of goods sold by auction; and that, in contracts entered into by the *East India* Company, the power of re-sale in case the seller refuses to perform his contract, is expressly provided for (*a*). That condition, however, is introduced by way of abundant caution, and to prevent disputes, which otherwise might continually arise at the Company's sales. But it has never been decided that a re-sale of goods by

(*a*) See *Eagleton* v. The *East India* Company, 3 Bos. & Pul. 55.

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the vendor, after the purchaser has refused to complete his purchase, bars the former from maintaining an action against the latter to recover damages for the deficiency, of the price obtained for the article on such re-sale. It appears that the contrary has been ruled at *Nisi Prius*. Without, however, considering the opinion of a single Judge, however able he may be, as an authority, we are anxious to decide this case on the principles of convenience and commercial usage, which are not inconsistent with reason or law. In doing this, we shall not go beyond our duty, or exceed any legal limits. It is most convenient, as well as beneficial, both to the buyer and seller, that, when the one refuses to perform his part of the contract, the other may re-sell the goods contracted for; and that the party refusing should be liable for the loss on the re-sale, if loss should arise. That must always depend on the fluctuating state of the market; and, whether the article sold be perishable or not, it may be deteriorated in value by being kept. Although the contract in this case was effected by a broker, who was not *absolutely* authorized by the defendants to enter into the contract for them, at the time he did so; yet as the defendants afterwards assented to that contract, and actually received part of the wools under it, we are of opinion, that this rule must be discharged.

Rule discharged.

(*a*) Mr. Justice *Park*, being related to one of the parties, retired before the argument, and took no part in the decision of the Court.

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IN THE EXCHEQUER CHAMBER.

LUCAS, Esq., THOMPSON, Esq., DAVIS, BULL, LINGHAM, and EICKE *v.* NOCKELLS.

Saturday, May 17th.

[In Error.]

In trespass for breaking and entering the plaintiff's ship, and seizing and converting his goods, the defendants justified under a writ of *fieri facias*, to which the plaintiff replied, *de injuriâ suâ propriâ absque residuo causæ*, and new-assigned that the defendants entered the ship and took the goods for other purposes than those mentioned in the plea:—*Held*, that it was competent to the Judge to leave it to the Jury to say whether the goods were *bonâ fide* taken under the writ, or whether the execution was resorted to as a colour for taking them, to evade payment of freight, to which they would have been liable had they accepted them under the bill of lading, and not to effect a levy by virtue of the writ.

A ship-owner, by a charter-party, let his ship for a year, to take any goods on board which the freighter should tender, and the freight was to be paid ten days after the delivery of the cargo:—*Held*, that the owner had sufficient possession of the ship to maintain trespass against wrong-doers for entering her, although he had no lien on the cargo for the freight.

THIS was an action of trespass, brought against the plaintiffs in error (defendants below) for breaking and entering the ship of the defendant in error (the plaintiff below), and seizing and taking certain goods and merchandizes then being therein.

The *first* count of the declaration stated, that the defendants below, on the 1st *January*, 1823, with force and arms, &c., broke and entered a certain ship of the plaintiff below, of the value of 6,000*l.*, then lying in the *London Docks*, and made a great noise and disturbance in and on board the said ship, and stayed and continued therein, making such noise and disturbance, for a long space of time, to wit, for the space of two days, then next following, and put and placed in and on board the said ship divers tackles and ropes, and fixed the same to the said ship, and broke open the hatchways, and greatly injured, damaged, and spoiled, the said ship, and greatly injured the hold thereof, and seized and took divers goods and merchandizes, to wit, three hundred casks of oil, one hundred bales of wool, twenty bundles of whalebone, two casks of seal skins, five casks of hides, &c., of great value, to wit, of the value of 10,000*l.*, then in the possession of the plaintiff below, in and on board the said ship, and on which said goods and merchandizes the plaintiff below had a lien,

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to the amount of 6,000*l.*, for certain freight due to him as owner of the ship, and carried away the said goods and merchandizes and converted and disposed thereof to their own use: by means whereof, the plaintiff below was deprived of his lien, and the freight had become and was wholly lost to him. The *second* count was for seizing and taking possession of a certain other ship or vessel of the plaintiff below, and seizing his goods (enumerating them, as in the first count), and carrying away the same, and converting and disposing thereof to the use of the defendants below. The *third* count was for seizing, taking, and carrying away the goods of the plaintiff below, then found and being in his ship or vessel, and converting and disposing of the same to the use of the defendants below.

To this declaration, two of the defendants below, *viz.* *Lucas* and *Thompson*, pleaded jointly,—*first*, not guilty;—and *secondly*, that, at and before the time of the supposed trespasses, they were Sheriff of *Middlesex*; that certain persons called *Randle Hopley*, *George Augustus Lingham*, and *Thomas Lingham*, had recovered, by judgment of the Court of *King's Bench*, against one *Nathaniel Thornton*, a debt of 20,000*l.*, and 84*s.* costs; that thereupon they had sued out a writ of *testatum fieri facias* against *Thornton*, directed to the Sheriff of *Middlesex*, returnable on *Thursday* next after the morrow of *All Souls*, and indorsed to levy 20,000*l.*, besides, &c.; that the said writ being delivered to them the said *Lucas* and *Thompson*, as such Sheriff, to be executed, by virtue thereof, and of a warrant duly made by them to two of their officers, *Davis* and *Bull* (two other of the defendants below), the said *Davis* and *Bull*, before the return of the writ, entered the said ship, and took in execution the goods and merchandizes mentioned in the declaration, being the goods and merchandizes of the said *Nathaniel Thornton*, and liable to be taken in execution by virtue of the said writ:—and they justified in the usual manner the breaking open of the hatchways to get at the goods, and

fixing tackle to the ship for the purpose of removing them. The other defendants below, *viz. Davis*, *Bull*, *Lingham*, and *Eicke*, severally pleaded, *first*, not guilty; and *secondly*, *Davis* and *Bull* severally justified as Sheriff's officers acting under the writ and warrant; and *Lingham*, as one of the plaintiffs in the suit against *Thornton*, and as an assistant to the officers; and *Eicke* also justified as an assistant. On the pleas of not guilty respectively, the plaintiff below joined issue; and, to the other pleas, after protesting the judgment and writ, replied, that the defendants below, of their own wrong, and without the residue of the cause by them in their last pleas alleged, committed the said several trespasses in the introductory part of those pleas mentioned. The plaintiff below also newly assigned that the defendants below, at other times, and on other occasions, and for other purposes, than those mentioned in the pleas, and with excessive and unnecessary force and violence, broke and entered the said ship, and seized, took, and carried away, the said goods. On these replications, the defendants below respectively joined issue, and, with the exception of *Lucas* and *Thompson*, who joined in their plea, pleaded severally not guilty to the new assignment: on which plea, also, issue was joined by the plaintiff below.

At the trial of the cause, before Lord *Tenterden*, at *Guildhall*, at the Sittings after *Trinity* Term, 1826, the facts appeared to be as follow:—The plaintiff below was sole owner of the ship *Emerald*, the ship in the declaration mentioned, on board of which the goods were seized. On the 8th *August*, 1822, a charter-party was duly executed at *Port Jackson*, *New South Wales*, between the plaintiff below, by his son, an agent duly authorized in that behalf and acting under a power of attorney, and *William Elliott*, the master of the vessel, and *Nathaniel Thornton*, by which (after reciting a former

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charter-party, bearing date the 16th *April*, 1821, by which the plaintiff below, for the considerations therein named, did grant and let to freight, and the said *Nathaniel Thornton* did hire and take to freight, all the said ship *Emerald*, for the term of one whole year certain, to commence on the 2d day of *May* then next ensuing, and after that, for so long a time as he, *Thornton*, should require, to perform the several voyages to be made as therein mentioned; and *Thornton* did thereby covenant and agree that he would pay, for all such time as the ship should be employed beyond one year, at the rate of one guinea *per* register ton *per* month; and also, that the parties had consented and agreed, and did consent and agree, to put an end to and determine that charter-party, and to enter into a fresh one) the plaintiff below, and *William Elliott*, the master, jointly and severally covenanted with the said *Nathaniel Thornton*, "that the ship should be made ready, and fitted and provided in all respects fitting for such a ship, and should and would receive and take on board all such goods, stores, and other articles, as he, the said *Nathaniel Thornton*, should tender to him, the said *William Elliott*, and should and would, with all convenient dispatch, proceed direct to *Macquarie* Island, and there take in and ship oil, &c., and proceed from thence to *Sullivan's Cove*, and there take on board a full cargo, and with all convenient speed proceed therewith to the port of *London;* and, upon the ship's arrival there, should make a right and true delivery and discharge of her cargo to *Thornton* or his assigns; and *Thornton* covenanted with the plaintiff below and *Elliott*, that he, *Thornton*, would, within ten days after the delivery of the cargo in the port of *London* to him or his assigns, pay or cause to be paid to the plaintiff below, or his agent, or to *Elliott*, as master of the ship, freight for the use of the said ship, at and after the rate of 15*s.* sterling *per* register ton *per* calendar month, for the use of the said ship from the 1st *May* then last past until her final discharge in the port of *London*."

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On the 2d *December*, 1822, a cargo, consisting of oil, wool, whalebone, skins, and hides (the goods in the declaration mentioned), was shipped by *Thornton* under the charter-party on board the *Emerald*, at *Van Dieman's Land*, for *London*; and *Elliott*, the master, signed a bill of lading, in which the cargo was described as having been shipped by *Thornton* to be delivered at the port of *London* to Messrs. *Hopley & Linghams*, or to their assigns, he or they paying freight for the goods as *per* charter, with primage and average accustomed. On the 27th *June*, 1823, the ship, with her cargo, arrived in safety in the river *Thames*; and, while she was near *Gravesend*, in the course of her voyage for *London*, *viz.* on that day, *G. A. Lingham* went on board, inquired about the state and quality of the cargo, and received letters from *Thornton* addressed to the firm of *Hopley & Linghams*. On the 30th *June*, *G. A. Lingham* went to the counting-house of the plaintiff below, in *London*, and said he wanted the ship to go to *Brewer's Quay*, but the plaintiff below insisted that she should go into the *London Docks*; when *Lingham* produced one part of the bill of lading, and said that he wished to look at the ship's manifest, and, on its being produced, it appeared that the goods were consigned to Messrs. *Hopley & Linghams*; on which the plaintiff below consented that the ship should go to *Brewer's Quay* to discharge, if *Hopley & Linghams* would pay freight for the goods according to the first charter-party; but he afterwards said, that, if they would agree to pay the freight at the lower rate mentioned in the second charter-party, he would consent to take the freight at such lower rate; to which proposition *Lingham* made no answer. After the ship had been reported at the *Custom-house*, *viz.* on the 1st *July*, the plaintiff below informed *Hopley* that she had been so reported, and offered to deliver the cargo where he, *Hopley*, and his partners, the *Linghams*, pleased, if they would agree to pay the freight; but

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Hopley said he would give no promise. Some altercation then took place between the plaintiff below and *Hopley*, when the latter said: "I will make something of you before I have done with you." On the 2d *July*, 1823, the writ of *testatum fieri facias* mentioned in the pleas, was sued out by *Eicke* (one of the defendants below), as the attorney for *Hopley & Linghams*, to whom *Thornton* was considerably in debt; and the writ was delivered, on the day it was issued, to *Lucas* and *Thompson* (two other of the defendants below), as Sheriff of *Middlesex*, who thereupon granted their warrant, directed to *Davis* and *Bull* (two other of the defendants below), as bailiffs of the Sheriff, to levy on the goods of *Thornton*. On the 3d *July*, *Davis* and *Bull* went on board the ship, and left a copy of the warrant with *Elliott*, the master, who gave it to the plaintiff below. The hatches were then open, but the plaintiff below desired the master to lock them down until further orders; and, when told by the master that he thought he was wrong in detaining the cargo, as the freight was not due until ten days after the delivery, the plaintiff below said "he would be damned if he cared," and ordered the master not to suffer the cargo to be taken out of the ship, or allow the use of the tackle to discharge her. On the following day, *viz.* the 4th *July*, four of the defendants below, *viz. Davis*, *Bull*, *G. A. Lingham*, and *Eicke*, again went on board the ship, when *Davis* produced the warrant under the writ in the pleas mentioned to the plaintiff below, and *Eicke* gave directions as to unloading the cargo. The plaintiff below protested against these proceedings, and required the defendants below to leave the ship; notwithstanding which, they broke open the hatches, which had been closed according to the directions of the plaintiff below, and began to unload the cargo, and continued to do so until the 17th *July*, by which day the whole of it was taken out, the amount of the sale of which *Davis* said, produced 1,950*l.*

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On the 4th *July*, Messrs. *Hopley & Linghams* presented a memorial in writing to the Commissioners of his Majesty's Customs, as follows:—

4th *July*, 1823.

"Honourable Sirs,—We have on board the ship *Emerald*, Captain *W. Elliott*, from *New South Wales*, 260 casks of train oil, which we have paid duty on, and are desirous of landing at the legal quays. The vessel is appointed for the *London* docks, but having no compellable goods on board, we hope your Honours will be pleased to direct officers to be appointed to the legal quays also. We remain, &c. *Hopley & Linghams.*"

On the same day, *Elliott*, the master, made two separate affidavits, that the cargo of oil and whalebone was *British* property; and, to the papers on which these affidavits were written, were annexed two others by *T. Lingham*, who, for self and co-importers, deposed, to the best of his knowledge and belief, that the cargo was *British* property. No auction-duty being payable on the first sale by the importer of the oil, *Hopley & Linghams*, on the 7th *August*, annexed to a catalogue for sale by public auction of (among other things) the oil, part of the cargo, the following certificate:—

London, 7th *August*, 1823.

"This is to certify, that the under-mentioned lots, included in Messieurs. *Aylwyn & Co.'s* public sale this day at *Garraway's Coffee House*, have been imported within twelve months from this date, and have not been previously sold or parted with, and that this is the first sale thereof. *Hopley & Linghams.*"

They also addressed a note to the auctioneer, as follows:—

London, 7th *August*, 1823.

"Mr. *John Aylwin.*—We appoint you to buy for our account this day, at Messrs. *Aylwin & Co.'s* public sale,

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the following goods, at the prices annexed, being our property. [Here followed a description of the oils sent by the *Emerald*, with the prices to be given for them.] Yours, &c. *Hopley & Linghams.*"

"I accept the above. *John Aylwin.*"

These two latter instruments were left by *Hopley & Linghams* at the *Excise Office*, and the goods were put up to sale by auction, under their direction, on the said 7th *August*, the Sheriff being previously indemnified by *Hopley & Linghams* in respect of any thing done under the writ and warrant.

The Lord Chief Justice, after detailing the evidence adduced on both sides, stated to the Jury, that he was of opinion that the possession of the ship remained in the plaintiff below, and that the question for their consideration was, whether the goods were really and *bonâ fide* taken by virtue of the writ of execution—for that, if they were, the verdict ought to be for the defendants below; or, whether the execution was had recourse to merely as a colour to enable the defendant *Lingham* and his partners, who were the consignees, to take the goods, and to get possession of them and land them, as importers, without subjecting themselves to the claim or question that might have arisen if they had accepted them under the bill of lading—in which latter case the verdict ought to be for the plaintiff below: whereupon the counsel on the part of the defendants below interposed, and objected—*first*, that the question so proposed by the Lord Chief Justice for the consideration of the Jury, was not open for their consideration upon the pleadings in the cause; for, that, if there were ground for imputing fraud, it ought to have been specially replied;—and, *secondly*, that none of the counts in the declaration had been proved; and that the Lord Chief Justice ought to direct and charge the Jury, upon the

evidence so produced as aforesaid, that the possession of the ship was not, at the time of the entering of the same by the defendants below, by law vested in the plaintiff below, and that the plaintiff below had no lien on the goods, and, consequently, that the plaintiff below was not competent to maintain the action: but from these objections the Chief Justice dissented; and the Jury found a verdict for the plaintiff below, on the several issues, with 1,950*l.* damages.—A bill of exceptions was then tendered to the Lord Chief Justice, which he sealed.

The questions proposed for argument in this Court were—*first*, whether the plaintiff below had, notwithstanding the charter-party, sufficient possession of the ship to enable him to maintain an action of trespass;—*secondly*, whether he had a lien on the goods seized, in respect of which he could sue in trespass for an illegal seizure of them;—and, *lastly*, whether, upon the pleadings in the cause, it was competent to the Lord Chief Justice to leave it to the Jury to say, whether the goods were *bonâ fide* taken under the writ of execution, or whether that was resorted to merely as a colour for taking them, and not for the purpose of effecting a levy under and by virtue of the execution, but with a view to land them, without subjecting *Hopley & Linghams*, three of the defendants below, to the claim of the plaintiff below for freight.

The case came on for argument on a former day in this Term.

Mr. *H. Pollock*, for the defendants below (plaintiffs in error).—Although it might be contended that the plaintiff below (defendant in error) had parted with the possession of the ship by the words of grant contained in the charter-party, according to the cases of *James* v. *Jones* (*a*), *Fraser* v. *Marsh* (*b*),

(*a*) 3 Esp. Rep. 27. (*b*) 13 East, 238.

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The *Master* of the *Trinity House* v. *Clarke* (*a*), *Hutton* v. *Bragg* (*b*), and *Parish* v. *Crawford* (*c*); yet, according to the later decisions of *Saville* v. *Campion* (*d*), and *Christie* v. *Lewis* (*e*), it may be conceded to the plaintiff below, that he had a sufficient right of possession of the ship to maintain an action of trespass for nominal damages against wrong-doers.—With respect to the second question, *viz.*, whether the plaintiff below had a lien on the goods in respect of which he could sue in trespass for an illegal seizure, that can only apply to the reduction of damages. But he had no lien, as, by the terms of the charter-party, the freight was not payable until ten days after the delivery of the cargo at the port of *London*. This case, therefore, falls within the principle established in *Hutton* v. *Bragg*, *viz.* that an agreement by a party to give credit, amounts to a waiver of his lien; and in *Raitt* v. *Mitchell* (*f*), where, a ship-wright in the river *Thames* having taken a ship into his dock to repair, and nothing was said as to the time or mode of payment until the repairs were completed, credit being given by the usage of the trade to the ship-owner in such cases, Lord *Ellenborough* held, that the ship-wright had no lien on the ship, saying, that "a lien is wholly inconsistent with a dealing on credit, and can only subsist where payment is to be made in ready money, or there is a bargain that security shall be given the moment the work is completed." In *Abbott on Shipping*, it is said, that (*g*) a lien may be extended, or wholly excluded, by particular contract, or special circumstances. But, in this case, the last is the only material question, *viz.*, whether it

(*a*) 4 Mau. & Selw. 288.
(*b*) 2 Marsh. 339; *S. C.* 7 Taunt. 14.
(*c*) 2 Str. 1251.
(*d*) 2 Barn. & Ald. 503.
(*e*) 5 B. Moore, 211; *S. C.* 2 Brod. & Bing. 410.
(*f*) 4 Camp. 146.
(*g*) 5th Edit. 171.

was competent to the Lord Chief Justice to leave it to the Jury to say whether the goods were *bonâ fide* taken under the writ, or whether the execution was colourable, with a view to land the goods without subjecting the plaintiffs in the execution to the claim which might have arisen to the plaintiff below, as owner of the ship, in case the goods had been accepted under the bill of lading. Where a party has obtained a judgment, and a writ of execution has been regularly sued out thereon, under which the goods of the debtor are taken and sold, it is not competent to a Jury to say that such writ was sued out for any other purpose than that of satisfying the debt due to the creditor; and the party at whose instance it was issued is not to be made a trespasser, nor those who assist him in the execution of the writ, wrong-doers, by relation; neither is the motive with which it was sued out traversable in pleading. Here, the judgment, the writ, and the warrant to the officers, as well as that the goods seized belonged to *Thornton*, are facts admitted on the record. The Sheriff and his officers were armed with a legal authority to seize the goods, and were protected by the writ. The motive or intent with which the writ was issued cannot be traversed. It was the province of the Jury to find the fact alone, not the intention; and even if the defendants below had avowed other motives for the seizure than the execution of the writ, as they proceeded under it, they were fully justified in what they did. In *Crowther* v. *Ramsbottom* (*a*), it was decided, that, in trespass for breaking and entering the plaintiff's close, and taking his goods, the defendant might justify under a sufficient legal process, if he had it in fact at the time; although he declared, at the time, that he entered for another cause. There, the plaintiff brought trespass against the defendants for breaking and entering his cow-house, taking away three cows, and convert-

(*a*) 7 Term Rep. 654.

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ing them to their own use; and the defendants justified under a writ of *justicies* to compel the plaintiff's appearance at a county court; and that, he having appeared, the cattle were re-delivered to him. The plaintiff in his replication, "admitted that the writ of *justicies* issued *modo et formâ*, but alleged that the defendants, of their own wrong, and without the residue of the cause by them pleaded, broke and entered the cow-house, and took and drove away the cattle, and detained the same, as stated in the declaration: on which issue was joined. At the trial, it appeared to be the usual practice of the county court to attach the party, in order to compel an appearance, by any small chattel, and to return it on payment of 2*s.* 4*d.*, which was considered by the officer of the county court as an appearance, and an entry was made accordingly. It also appeared, that, when the cows were seized, one of the defendants said that he was a sheriff's officer, and was come for the cows for 7*l.* debt and 5*l.* costs; and although, on the same day the cattle were taken, the plaintiff's attorney applied to the defendants, and tendered 2*s.* 6*d.*, and demanded to have the cows restored, yet they were kept four days after they were taken. On this evidence, it was left to the Jury to say, whether the defendants entered for the mere purpose of compelling an appearance, or whether for the purpose of compelling the plaintiff to pay the debt and costs. The Jury found a verdict for the plaintiff; and, on a motion being afterwards made for a new trial, Lord *Kenyon*, after argument, said, "I never understood that a man was obliged to justify a distress for the cause which he happened to assign at the time it was made. If he can shew that he had a legal justification for what he did, that is sufficient. A man may distrain for rent, and avow for heriot-service. Now, here, it appears that the defendants were justified, under the process of the county court, in entering upon the plaintiff and taking his goods, in order to compel an appearance; and

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therefore the question ought not to have been left to the Jury to say, whether they entered for that or some other cause." So, here, as the defendants below entered the ship under the writ and warrant, the purpose or motive with which they made the seizure is altogether immaterial. In *Ex parte Wilbran* (*a*), an application was made to supersede a commission of bankrupt, on the ground that it was taken out for the purpose of dissolving a partnership, as far as regarded the petitioner; and the Vice Chancellor said, "A commission is, in a qualified sense, a legal right, like an action; and Courts of justice have no concern with the motives of parties who assert a legal right." But the case of Dr. *Groenvelt* v. The *College of Physicians* (*b*), referred to by Mr. Justice *Lawrence* in *Crowther* v. *Ramsbottom*, is precisely in point. There, in trespass against *J. S.* for an assault and wounding and false imprisonment, the defendant, as to the force and arms and wounding, pleaded not guilty; and, as to the residue of the trespass, he justified it under the authority of the censors of the College, for mal-practice by the plaintiff in his profession of a physician. The plaintiff replied, that the defendant, *de injuriâ &c.*, made the assault, *absque hoc*, that he did it by the authority set forth in the plea; and, upon demurrer, the replication was held ill: and Lord Chief Justice *Holt* said: "Suppose one has a legal and an illegal warrant, and arrests by virtue of the illegal warrant, yet he may justify by virtue of the legal one; for, it is not what he declares, but the authority which he has, is his justification. If one distrain for an unjustifiable cause, yet when he comes to avow, he need not insist on the cause for which he had distrained, but may justify for any legal cause, as, for rent arrear, though he distrain for some other cause; and the cause for which the distress in truth was, is not traversable; but *riens arriere* is the proper plea." That is war-

(*a*) 5 Madd. 1. (*b*) 12 Mod. 386 (*nom. Grenville*).

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ranted by *Butler* and *Barker's* case, where it was resolved (*a*), "that, if a man take a distress for one thing, yet, when he comes into a Court of record, he may avow for what thing he pleases." From these authorities, it is quite clear, that the motives of a party acting under a legal authority cannot be questioned; neither can they be left to a Jury: and it necessarily follows, that, where the justification is legal, and put clearly on the record, the intention of the party cannot be traversed, nor can an objection be raised by demurrer. Here, therefore, the judgment, writ, and warrant, having been set out on the face of the pleas, those who acted under the warrant cannot be presumed to have seized the goods with a fraudulent intent. At all events, the sheriff and his officers, who acted under and in obedience to the writ and warrant, are clearly protected. There is a manifest distinction between rights derived from law, and those founded on contracts or agreements. The latter may be inquired into, as in the case of a right of way, where the party claiming an unqualified, has a mere qualified or restricted right; but, if a legal authority exist, the right or motive under which the party acts, cannot be questioned or disputed. If a debt be owing to a creditor, he has his remedy to recover it by action, and, if it amount to a bailable sum, he may arrest his debtor; but it cannot be said that he was actuated by malice, although his taking the body of the debtor might not have been requisite to the obtaining of his debt. So, if an offence be committed, the offender may be prosecuted; and, although the prosecutor may be actuated by motives the most vindictive and oppressive, still, his motives cannot be inquired into, if he had a legal right, or even a probable cause, to prosecute. Every one is presumed to know the law; and where a party acts under process sanction-

(*a*) 3 Rep. 26.

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ed by it, his protection is absolute. If the intent, in a case of this description, could form a subject for the consideration of a Jury, it would seriously affect, as well the rights of individuals, as those of sheriffs and other officers acting under process, who might thereby unconsciously be made trespassers, although clothed with the highest legal authority.

Mr. *Campbell, contrà.*—It having been admitted that the plaintiff in error had a sufficient possession of the ship, at the time of the seizure of the goods in question, to entitle him to maintain trespass, whether he had a lien on them or not is a mere secondary consideration, and does not affect the merits of the case. The main and only remaining point then, is, whether, on the pleadings in the cause, it was competent to the Lord Chief Justice who presided at the trial to leave it to the Jury to say whether the goods were *bonâ fide* taken under the execution, or whether they were taken colourably, and not with a view to effect a levy by virtue of the writ. The defendants below averred in their pleas, that they seized the goods and sold them under the execution. Whether they did so or not might either have been traversed or disproved. The plaintiff below, by his replication, admitted that the writ had been sued out on the judgment against *Thornton*, and that the warrant had been delivered to the officers of the sheriff to be executed; but they alleged that the defendants below, of their own wrong, and without the residue of the cause by them in their plea alleged, committed the trespasses complained of. The traverse was of a mere matter of fact, *viz.* whether the defendants below, although armed with a writ, acted under it or not. But the new-assignment is a complete answer to the objection, as it contained an express allegation that the defendants below entered the ship and took the goods for other purposes than those mentioned in the pleas; and on this issue was

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joined. This clearly was not a traverse of motive or intent, but of fact. So, the question of intent was not left to the Jury; but only whether the goods were *bonâ fide* taken under the execution, or whether it was had recourse to merely to enable Messrs. *Hopley & Linghams*, the consignees, to take the goods and land them as importers, without subjecting themselves to the claim that might have arisen, if they had accepted them under the bill of lading. Although parties may ostensibly act under process of law; yet, the Court may inquire whether such process has been sued out colourably and with a view to fraud. If this had been a fair and honest transaction, the defendants below would have proceeded to levy the debt according to the exigency of the writ, and would have endeavoured to obtain the best price for the execution-creditors, by the sale of the goods; but, instead of this, the goods were handed over to *Hopley & Linghams*, not as creditors, but as importers; which was altogether beside the purpose for which the writ was issued. It is, therefore, clear, that the seizure was made with a fraudulent intent, *viz.* to enable *Hopley & Linghams* to evade the claim of the plaintiff below for freight, under the pretext of seizing the goods in execution. All the cases cited for the defendants below are distinguishable from the present, as the parties acted *bonâ fide* under legal process. *Crowther* v. *Ramsbottom* merely establishes the principle, that, if a party act under legal process, he is protected, although he allege that he makes the seizure for another cause. Here, however, the defendants in error professed to act under the warrant, although, in point of fact, they did not do so.

Mr. *F. Pollock*, in reply.—The plaintiff below had not, at the time of the seizure, such a property in the goods as to protect them from being taken in execution; nor had he a lien on them for freight, either under the charter-party, or by virtue of the bills of lading, as the freight

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was not payable until ten days after the delivery of the cargo. The plaintiff below could only claim such freight against the charterer, *Thornton*. In *Moorsom* v. *Kymer* (*a*), where a ship was chartered, on a voyage out and home, for a specified time, at a certain rate of payment on the homeward cargo in full for the hire of the ship for such time, to be paid in part by an advance on the ship's clearing for the outward voyage, and the rest, on her return, by bills payable at a future day; and on loading the homeward cargo, a bill of lading was signed to deliver the goods to the charterers or their assigns, he or they paying freight for the goods as *per* charter-party;—it was held that the indorsees of the bill of lading for a valuable consideration were not liable to the owner of the ship on an implied *assumpsit* to pay the freight, arising out of the receipt of the goods under the bill of lading. If parties be guilty of an abuse of process, the injured may have redress by making a proper application to the Court from which the process issued; but, where a party is armed with a legal authority, it must be presumed that he acted under it; and, however reprehensible his conduct may be, his motive cannot be inquired into; nor can he be made a trespasser: and, here, as the goods were seized by officers having a writ and warrant, it cannot be assumed that they were not taken under the execution. The only irregularity was, in causing them to be transferred to the creditors at whose suit the writ was issued, instead of selling them in the first instance. At all events, if there were any ground to impute fraud to the defendants below, it should have been replied specially, and have appeared on the face of the record; but, as the pleadings are framed, the legality of the seizure under the execution cannot be disputed.

Cur. adv. vult.

(*a*) 2 Man. & Selw. 303.

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Lord Chief Justice BEST, now delivered the judgment of the Court as follows:—The bill of exceptions raises three questions for our decision.—*First*, was it competent to the Chief Justice, on the pleadings in this cause, to leave it to the Jury to say whether the goods were really and *bonâ fide* taken by virtue of the writ of execution, or whether the execution was had recourse to, merely as a colour to enable the defendants, *Hopley & Linghams*, to get possession of and land the goods as importers, without subjecting themselves to the claim that might have arisen if they had accepted them under the bill of lading.—*Secondly*, whether the plaintiff below had such a possession of the ship as would enable him to maintain trespass.—*Thirdly*, whether the plaintiff below had any lien on the goods for the freight due for bringing them from *Van Dieman's Land* to *London*.

The Counsel for the plaintiffs in error very properly declined arguing the second question.

The charter-party by which the ship was let to freight, contained no terms conveying to the charterer the possession of the ship. It was a covenant that the master would bring in her all the goods that she was capable of carrying. As the freight was by the bill of lading made payable according to the terms of the charter-party, and as by the charter-party no freight was due until ten days after the delivery of the cargo, we think that the plaintiff below had not a lien on the cargo for the freight. But, although the plaintiff below had no lien, and although *Hopley & Linghams* were entitled to have the cargo delivered to them under the bill of lading, yet they had no right to take it by force, without producing the bill of lading, and so avoid acceding to the condition on which the cargo could be claimed under the bill of lading, *viz.* that of becoming responsible for the payment of the freight according to the terms of the charter-party. The special property

which the plaintiff below had in the cargo, was sufficient to support an action of trespass against those who took it from him without authority from the owner.

The circumstance of the plaintiff below having no lien, could only operate in reduction of damages; and this was not the ground on which the Chief Justice's direction was excepted to. But the want of lien in the plaintiff below, as the freight would not become due from *Hopley & Linghams* until ten days after they had taken the cargo if they had claimed it under the bill of lading, could not have such an effect on the amount of damages as to render it proper to send the case to another trial.

The exception on which the first question is raised, applied to the pleadings in the cause; but the Counsel for the plaintiffs in error has insisted, in his argument before this Court, that, as they had a writ which would justify their entering the ship and taking the cargo, it would not have been competent to the Chief Justice, whatever pleadings had been on the record, to direct the Jury to inquire whether or not they did the acts complained of under the authority given to them by that writ. In other words, that, the plaintiffs in error having authority to do what they did, that authority will protect them, although they did not act under it. Perhaps, if the writ had given them authority to do all that they did, we could not, without over-ruling some decided cases, hold that the Jury might inquire whether or not they were acting under the writ. But it will be found that the writ of execution did not justify the conduct of the plaintiffs in error. The writ, therefore, could not protect them. The action was maintainable whether they entered the ship under the authority of the writ or not, if the writ did not justify them in disposing of the cargo in the manner in which it was disposed of by them. Although they did enter the ship under the writ, yet, if they dealt with the cargo in a different manner from that in which the writ required them to deal with it, they made

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themselves trespassers *ab initio*. Reason, as well as law, says, that a party who abuses an authority shall not protect himself by it. In the case of *Dye* v. *Leatherdale & Simpson* (*a*), the plaintiff complained that the defendants took a certain hog, drove it away, and converted it to their own use. The defendants justified, that they took the hog *damage feasant* and impounded it. The plaintiff replied, that, after taking and impounding the hog, the defendants *converted it to their own use*. The Court held the replication good, because, when the defendants had shewn that the taking and impounding were lawful, it became necessary to re-assert the converting and disposing to their own use; for, by that, the Judges said, the defendants made themselves trespassers *ab initio*. In *Reed* v. *Harrison* (*b*), which was an action of trespass for taking goods, the defendants justified under an attachment; but it appearing on the plea, that they continued in possession of the plaintiff's premises from the 17th day of *July*, 1775, to the 10th day of *January*, 1776, the Court held, that, by not removing the goods, and by continuing so long on the plaintiff's premises, although they entered under the writ of attachment, they had made themselves trespassers *ab initio*. So, in the present case, if the plaintiffs in error had a writ that would have justified their entering the ship, seizing the cargo, and selling it to raise the money to pay the debt to levy the amount of which the execution was sued out; yet, if they did not deal with the property according to the exigency of such a writ, but in a different manner, and thereby occasioned an injury to the plaintiff below, he might with right say, it is true that you had a writ, but you did not do what that writ commanded you, but dealt with the goods in a manner very different from that which the writ directed, and, therefore, you are trespassers. This he has said, by traversing all the pleas ex-

(*a*) 3 Wils. 20. (*b*) 2 Sir Wm. Bl. 1218.

cept the judgment and the writ. By his new assignment, he says—although you had a writ, you did not enter the ship under it.—Upon these pleadings, it was for the Jury to inquire whether the plaintiffs in error were acting under the writ, or merely obtained the writ to give a false colour to their conduct.

It has been argued before us that motives are not examinable, and that the allegation, in pleas, of *virtute cujus*, is not traversable. If a man do that which he is justified in doing, and no more, the law, in many cases, will not permit his motives to be inquired into: as, if he have a right to prosecute for a crime, or to arrest for a debt, there can be no inquiry as to the motives with which these acts were done; but, if he do more than as a prosecutor or creditor he have a right to do, he will not be justified, and it becomes proper to inquire whether the prosecution or arrest were not mere pretence. Such an inquiry is material for the purpose of getting at the real nature of the transaction, and enabling a Jury to award proper damages. The *virtute cujus* is sometimes a mere inference of law, as, what is the meaning of a writ, or the extent of authority given by it. In such cases, a question of law is raised, and there can be no traverse; for that withdraws the consideration of law from the Judges, and presents it to the Jury. But the *virtute cujus* sometimes raises a mixed question of law and fact; and, when this is the case, there may be a traverse, for that is the only mode by which the facts are to be settled, on which the law depends. In *Beal* v. *Simpson* (*a*), Mr. Justice *Powell* says, that, when a matter of law is only comprised in a *virtute cujus*, then it is not traversable; but matter of fact in the *virtute cujus* is traversable. Lord Chief Justice *Treby* differed from Mr. Justice *Powell* on this point, and said: "*By virtue of the writ*, means, by authority of the writ, by an operation of law on the writ, without any ingredient or mixture

(*a*) 1 Ld. Raym. 410.

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of matter of fact." The other Judges agreed with Mr. Justice *Powell*, and said, that when the *virtute cujus* is mixed with fact, it may be traversed. It appears from *Williams's Saunders* (*a*), that *virtute cujus* may be traversed, and he refers, in support of this opinion, to *Hobart* (*b*), and 9 *Hen.* 6 (*c*). The learned editor, Mr. Serjeant *Williams*, says, that when the words *virtute*, *prætextu*, *per quod*, &c., introduce a consequence from the preceding matter, they are not traversable; but that matter of law connected with fact, or rather matter of right resulting from facts, is traversable. In the *Grocers' Company* v. The Archbishop of *Canterbury*, Lord Chief Justice *De Grey*, in giving the judgment of the Court, says (*d*), "law connected with fact is clearly traversable."

In this case, the plaintiff below does not, by his replication and new-assignment, deny the motive with which the writ of execution was executed, or raise any question as to the import of the writ; but he says, although you had a writ, you did not use it, you did not enter under the writ; and I deny what you have asserted in your plea, that you, the Sheriff, sold the goods, and levied the debt by such sale, and paid the money so levied to the other defendants below, who caused the writ to be issued. On the contrary, he says, that the defendants below, *Hopley & Linghams*, took the goods as indorsees of the bill of lading, and made the Sheriff their instrument, to give the transaction the colour of an execution, in order that they might get the goods without paying the freight, and oblige the plaintiff below to seek his remedy against a charterer who may be out of the reach of our law, or may be insolvent. These are facts. These were to be submitted to the Jury, not with what motives the writ was executed, but whether it *was* executed. It is not necessary for us to decide what would have been the effect of the claim of the plaintiff

(*a*) Vol. 1, page 23. (*b*) Page 52. (*c*) Fol. 14, 20. (*d*) 3 Wils. 234.

below for freight, if the goods had been sold under the execution. If they were not taken and sold under the execution, he has a right to take advantage of it, and to obtain from the plaintiffs in error the freight which is justly due from them to the plaintiff below. In this case, the plaintiff below complains that the defendants below took his goods and *converted and disposed of them to their own use.* The defendants below say, that *Hopley & Linghams* had a judgment against the consignor and owner of the goods; that on that judgment they issued a writ of *testatum fieri facias,* by which the defendants below, the Sheriff, was commanded, that, of the goods of the consignor, he should cause to be levied the debt and damages due under the judgment, and have the money, so levied, before our lord the King at *Westminster;* that the Sheriff made the warrant under that writ to the defendants below (the officers); that they entered and took the goods in execution; that the Sheriff sold them, and by the sale levied 1,950*l.;* and that he paid the 1,950*l.* to *Hopley & Linghams* in part satisfaction of their debt. The substance of the replication is,—although it is true there was such a judgment as is pleaded, although a writ was sued out, yet the defendants below did not enter the ship to execute that writ; they did not proceed to sell the goods, as they say they did; they did not levy the money and pay it to *Hopley & Linghams,* the plaintiffs in the execution: but the goods were taken under another authority, and for a purpose different from that of levying the money due to the judgment-creditors. In the new assignment, the plaintiff below says, that the defendants below (plaintiffs in error), *for other purposes than those mentioned in the pleas, entered the ship and took the goods.* If the question can be raised, whether the goods were taken under the bill of lading, or under the writ, these pleadings are calculated to raise it. They put that question directly in issue. The question is not raised by an inference of law from the writ only, but from facts. If the

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Sheriff's officers had a warrant, and instead of proceeding to dispose of the goods according to the directions in the warrant, they took the goods, intending to keep them for their own use, might not that be shewn by their conduct with regard to the goods subsequently to their taking them? Certainly it might. In this case, the manner in which these goods were disposed of after they were taken, shews as plainly that they were not seized under the writ, as if the officers who took them had kept them for their own use. Instead of being sold by the Sheriff, and any debt levied by the sale, they were handed over to *Hopley & Linghams*. *Hopley & Linghams*, instead of taking the goods as purchasers from the Sheriff, tell us by their whole conduct, and most distinctly by their oaths, that they obtained the goods as importers. In such a case, is not the *virtute cujus* a mixed question of law and fact, and so, according to the authorities that I have referred to, traversable. Is it consistent with common sense to say, that, although some of the defendants below have sworn that they were the importers of the goods, and held themselves out as having the goods as importers, and in no other character; yet, because they had a writ of execution against the consignor, when they dare to state on the records of a Court of Justice that they possessed themselves of them by virtue of that writ, they cannot be contradicted; but that, to defeat justice, their plea must be taken to be true, although negatived by their conduct—although shewn to be false by the oaths of some of those who pleaded it? It is proper to take notice of the cases that have been cited by the counsel for the plaintiffs in error. The first that was mentioned, was *Crowther* v. *Ramsbottom* (*a*). In that case, the defendants were authorized by the writ of *justicies* to do all that they were charged to have done. They were empowered to attach the plaintiff by his goods to compel an

(*a*) 7 Term Rep. 654.

appearance. They did no more; for the property taken was restored to the plaintiff on his entering an appearance. If they used too much violence, that should have been new-assigned; and, if they took more property than it was necessary for them to take, that, as Lord *Kenyon* says, only rendered them liable to an action on the case on the statute of *Marlebridge*, but did not make them trespassers. Lord *Kenyon* says, "If he (the defendant) can shew that he had a legal justification *for what he did*, that is sufficient. A man may distrain for rent and avow for heriot-service."

In the case before us, the writ does not justify all that the defendants below have done. In the language of Lord *Kenyon*, it is not a legal justification for *what they have done;* on the contrary, the conduct of the defendants below is so unlike the conduct required by the writ, that the plaintiff below has a right to say, that what was done could not have been done in execution of the writ.

In the case of the distress mentioned by Lord *Kenyon*, it is precisely the same thing to the party distrained on whether the distress were for rent or for heriot-service, if the property were taken as a distress, and treated as the law requires that property so taken should be treated. In the present case, the property was not treated as it would have been if it had been taken under the writ. The reason on which the case of distress is founded, is, that, if the party have a right to do the act complained of, he should not be deprived of the advantage which that right gives him, by an immaterial misdescription of his right in the pleadings.

The only other case cited is Dr. *Groenvelt* v. Dr. *Burwell* and Others (*a*). In that case, the plea justifies the *imprisonment*, which was all that the plaintiff complained of, under a warrant from the *College of Physicians*, for *mala praxis*. The replication does not state any facts to shew, from the defendants' conduct, that they were not acting

(*a*) 3 Salk. 354; *S. C.* 12 Mod. 386; 1 Ld Raym. 454.

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under the warrant, but merely says, that which they did, was done of their own wrong. This justification, as is said in the short report of the case in *Salkeld, was merely denying the legality of the warrant;* and, if the defendant was not taken under the warrant, but for some other cause, he should have pleaded that cause specially. That was a traverse of matter of law, *viz.* the legality of the warrant; and not, as in the present case, an allegation that the writ was not used, and would not authorize the manner in which the property was disposed of by the defendants below. Lord Chief Justice *Holt* says, "If the plaintiff was arrested for any other cause, and not on this warrant, then the plaintiff should have shewn the other cause." The plaintiff below in the present case has shewn that the goods were taken for another cause, and he satisfactorily proved, at the trial, that they were taken for another cause, and not under the writ. If, according to the strict rules of pleading, he ought to have stated the particular cause for which they were taken, it is too late to take advantage of that formal defect in the replication.

The cases on which the counsel for the defendant below relies, are distinguishable from that which we are now called on to decide. This was an attempt to abuse the process of the Court, by suing it out for the purpose of defeating the right of the plaintiff below to freight. We affirm the judgment of the Court below.

Judgment affirmed.

END OF EASTER TERM.

AN

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1. By an act of Parliament (47 *G.* 3, c. 72) for supplying the inhabitants of certain parishes with water, the Company were empowered (sect. 32) to make and maintain waterworks, aqueducts, &c. &c.; and, for the purpose of distributing the water to the different inhabitants, to dig and break up the soil and pavement of any of the roads, highways, *footways*, commons, streets, lanes, alleys, passages, *and public places*, within and near to the said parishes; and, by the 34th section, it was provided, that the Company should not make any aqueduct, &c. across or over, or enter upon, the *private* lands or grounds of any person, *without the consent* of the owner or occupier; or into or upon any common, without the consent of the lord of the manor:—*Held*, that the word *footways*, in the 32nd section, must be confined to footways before houses, or in public places, and not extended to footways running across inclosed fields. *Scales* v. *Pickering*, *H.* 8 & 9 *G.* 4. 195

2. By a private Act of Parliament, the expenses attending its passing were directed to be paid out of the tolls raised or levied, or to be raised, under it. The attorney who prepared and solicited the act, sued the clerk to the commissioners named in it, for the amount of his bill:—

Held, that he was bound to shew that there were sufficient funds in the hands of the commissioners, which had been raised or levied by tolls or otherwise, to satisfy his demand. *Andrews* v. *Dally*, *E.* 9 *G.* 4. 490

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1. The defendant having, as administrator, received a sum of money, which it was agreed by the parties entitled to it, was to be applied in discharge of the funeral expenses of the testator's widow, which had been paid by the plaintiff, promised so to apply it:—*Held*, that the plaintiff was entitled to recover it in an action for money had and received. *Meert* v. *Moessard*, *M.* 8 *G.* 4. 8

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1. An affidavit of debt sworn before a commissioner in the country, without stating him to be a commissioner in the jurat, is insufficient, although intitled in this Court; and the Court will not allow a supplemental affidavit to aid the defect to be filed. *Howard* v. *Brown*, *M.* 8 *G.* 4. 22
2. In an action on a bond, at the suit of the obligee, for the benefit of the assignee, against the obligor, the affidavit to hold to bail was made jointly by the plaintiff (the obligee) and the assignee, the former swearing that a certain sum was due for principal and interest on the bond, and that he had assigned it to the latter; and the latter, that the sum due on the bond still remained unpaid, and due and owing to him as

assignee:—*Held*, sufficient. *Fairman* v. *Farquharson*, *H.* 8 & 9 *G.* 4. 179

3. An affidavit to hold to bail, stating that the defendant was indebted to the plaintiff in 20*l.* lent and advanced on a bill of exchange for 37*l.*, drawn by *J. S.* on and accepted by the defendant, and now over-due and unpaid,—is sufficient. *Bennett* v. *Dawson*, *E.* 9 *G.* 4. 594

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2. A party outlawed can only appear in Court for the purpose of reversing his outlawry. Where, therefore, a defendant, the grantor of an annuity, who had been outlawed in an action in the Court of *King's Bench* for arrears, applied to this Court to set aside the securities, on the ground of an illegality in the grant in the first instance:—*Held*, that he could not be heard. *Loukes* v. *Holbeche*, *M.* 8 *G.* 4. 126

3. The grantor of an annuity having become bankrupt before the passing of the 6 *Geo.* 4, c. 16, the grantee sued the surety for arrears subsequently accruing after the statute came into operation:—*Held*, that he could maintain no action until after proof of the annuity under the commission, in pursuance of ss. 54 and 55. *Bell* v. *Bilton*, *E.* 9 *G.* 4. 574

APOTHECARY.

See SURGEON.

ARBITRATION.

See REPLEVIN-BOND.

1. By a deed of submission to arbitration, it was provided, that the submission should not vacate or expire through the decease or insolvency of either of the parties, but should, notwithstanding such an event, be proceeded in, and the

matters at issue determined, in the same manner as if such an event had not occurred; and the parties bound themselves, their heirs, executors, and successors, to abide by the award. The arbitrator, by his award, directed the *executors* of one of the parties (who had died before the award made) to pay a certain sum to the other; and they having no assets, the party in whose favour the award was made, sued the surety on a bond conditioned for the due performance of the award by the principal, his heirs, &c.; in which bond the clause as to the death was not inserted:—*Held*, that the authority of the arbitrator was not determined by the death; and, the surety having pleaded performance of the award, according to the covenants contained in the *said* deed of submission, which deed was set out in a former plea:—*Held*, that the two pleas might be taken together, there being an express reference in the one to the other. *Macdougal* v. *Robertson*, in Error, *M.* 8 *G.* 4. 147

2. By a deed of submission in the *Scottish* form, an award was to be made betwixt and the day of next, or any other day to which the submission might be prorogated:—*Held*, that the absence of date was immaterial, as it was equivalent to a general authority, to be executed within a reasonable time. *Ibid.*

ARREST.

See Annuity.

1. A person was arrested within the liberty of the *Tower* of *London*, by an officer of the Sheriff of *Middlesex*, under a writ of *capias* without a *non omittas* clause; and gave a bail-bond:—The Court refused to order it to be delivered up to be cancelled. *Bell* v. *Jacobs*, *H.* 8 & 9 *G.* 4. 309

ASSIGNEES.

See Affidavit to hold to Bail, 2.
Bankrupt.
Insolvent Debtors.
Practice, 21.
Trover, 2, 5.

ASSIGNMENT.

See Insolvent Debtors.

ASSIZES.

See Practice, 5.

ASSUMPSIT.

See Administrator.
Bills of Exchange, 1, 3.
Carrier.
Executor.
Frauds, Statute of.
Pleading, 4, 10.
Practice, 8.

1. *Assumpsit* lies in the Courts at *Westminster*, on a *Scotch* decree, obtained in absence, against a native of *Scotland*, for a debt contracted in *Scotland*. *Douglas* v. *Forrest*, *E.* 9 *G.* 4. 663

2. By a charter-party, fifty running days were to be allowed for loading and unloading a cargo of timber, and ten days on demurrage, over and above the laying days, at 10*l.* *per* day; and, by the bill of lading, freight was to be paid as *per charter-party*. The consignees having placed the cargo in the defendant's hands, for sale, he engaged, in writing, to pay the owner the freight and primage (and demurrage, if any were due), *and in every respect to put himself in the place of the charterer*. The ship having been detained in unloading her cargo, beyond the lay-days and days of demurrage in the charter-party:—*Held*, that the defendant

was liable to the owner for such detention. *Benson* v. *Hippius*, *H.* 8 & 9 *G.* 4. 246

3. The plaintiffs insured goods for the defendants, pursuant to an undertaking to effect the insurance with such names as should be to the defendants' *satisfaction*. After the arrival of the vessel, the defendants objected to reimburse to the plaintiffs the premiums paid by them, on the ground that the names of the under-writers had not been previously submitted to them for their approval:—*Held*, that the plaintiffs had sufficiently complied with the terms of their agreement. *Dixon* v. *Hovill*, *E.* 9 *G.* 4. 656

4. The defendant offered to purchase of the plaintiff the lease of a house, requiring possession to be given *on the 25th July*, and a definitive answer within six weeks. The plaintiff accepted the proposal, offering possession *on the 1st August*. The defendant afterwards, and before the six weeks had expired, retracted his offer:—*Held*, that the plaintiff's acceptance of the defendant's offer not being in the terms proposed, and no proper acceptance of it having been given before the defendant withdrew, the agreement was vacated. *Routledge* v. *Grant*, *E.* 9 *G.* 4. 717

ATTACHMENT.

See PRACTICE, 9.

ATTORNEY.

See ACT OF PARLIAMENT.
EVIDENCE, 1.

AUDITA QUERELA.

See PRACTICE, 12.

AVOWRY.

See JOINT-TENANTS.

BAIL.

See ERROR.
PRACTICE, 2, 3, 9, 20.

1. On a motion to set aside an attachment against the Sheriff (the bail in the action having, by mistake, justified in the Court of *King's Bench* instead of in this Court), the affidavit stated that the application was made at the instance of the bail, and without collusion with, or indemnity from, the defendant:—The Court granted the application, but observed, that, in future, they would also require the affidavit to state it to be *at the expense* of the bail. The *King* v. The *Sheriff of London*, *M.* 8 *G.* 4. 177

BAIL-BOND.

See PRACTICE, 3.

1. A person was arrested within the liberty of the *Tower* of *London*, by an officer of the Sheriff of *Middlesex*, under a writ of *capias* without a *non omittas* clause; and gave a bail-bond:—The Court refused to order it to be delivered up to be cancelled. *Bell* v. *Jacobs*, *H.* 8 & 9 *G.* 4. 309

BAILIFF.

See DISTRESS.
JOINT-TENANTS.

BANKRUPT.

See PRACTICE, 12, 21, 26.

1. The defendants, being bankrupt, were sued, and suffered judgment by default in *Trinity* Term, and final judgment was entered up, and execution issued thereon, in *Michaelmas* Term following. On the 13th *November* in that Term, the defendants obtained their certificate, and, *on the same day*, the sheriff's officer levied, and he, notwithstanding a notice that the defend-

ant's certificate had been allowed, being about to sell the goods seized, the defendants paid the amount of the debt and costs into Court, under a Judge's order, to abide the event of a motion. On application by the defendants to have the money paid out to them, the Court refused to interfere; but left the parties to their *audita querela;* although it was insisted, that, by the 6 *G.* 4, c. 16, s. 126, the *goods* as well as the *persons* of bankrupts are protected. *Hanson* v. *Blakey*, *H.* 8 & 9 *G.* 4. 261

2. By the 6 *Geo.* 4, c. 16, s. 92, it is enacted—"that, if the bankrupt shall not, within a certain period after the adjudication, give notice of his intention to dispute the commission, the depositions taken before the commissioners shall be conclusive evidence of all matters therein contained, in all actions at law brought by the assignees, for any *debt or demand* for which the bankrupt might have sustained an action:"—*Held*, that *trover* is an action for a *demand*, within the meaning of that section. *Robson* v. *Alexander*, *E.* 9 *G.* 4. 448

3. In an action by the assignees of a bankrupt, a clerk of the defendant's attorney delivered a plea of the general issue, at the office of the plaintiff's attorney, without a notice to dispute the bankruptcy, as required by the statute 6 *Geo.* 4, c. 16, s. 90. On the same day, and before the time for pleading had expired, the clerk called again and took away the plea, saying that there was a mistake in it; and shortly afterwards he delivered another, with the notice attached:—*Semble*, that such notice is insufficient. *Lawrence* v. *Crowder*, *E.* 9 *G.* 4. 511

4. If a sheriff take goods in execution after an act of bankruptcy committed by the party against whom such execution is sued out, the sheriff is liable to the assignees in trover, although he had no notice of the act of bankruptcy, and although the commission did not issue until nearly two months after the execution,—on the ground that the property of the bankrupt vests in his assignees, from the time of the act of bankruptcy, by relation;—and this, although the goods seized were not removed from the premises, but were only detained there until the amount directed to be levied was paid by the bankrupt to the sheriff. *Price* v. *Helyar*, *E.* 9 *G.* 4. 541

5. The grantor of an annuity having become bankrupt before the passing of the 6 *Geo.* 4, c. 16, the grantee sued the surety for arrears subsequently accruing, after that statute came into operation:—*Held*, that he could maintain no action until after proof of the annuity under the commission, in pursuance of ss. 54 & 55. *Bell* v. *Bilton*, *E.* 9 *G.* 4. 574

6. If a petitioning creditor make an affidavit of debt, on which a commission is sued out, stating that the party against whom the commission is to be issued, is indebted to him in the sum required by the statute, and that such party has become bankrupt, he cannot afterwards, in an action brought against him by the assignees under a second commission (the former having been superseded), dispute the validity of the commission founded on his affidavit; and, in such case, the writ of *supersedeas* is sufficient evidence of the issuing of the first commission. *Ledbetter* v. *Salt*, *E.* 9 *G.* 4. 597

BILL OF EXCEPTIONS.

See PLEADING, 13.
TRESPASS, 3.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See AFFIDAVIT TO HOLD TO BAIL, 8.
EVIDENCE, 3.
PLEADING, 7, 8, 10.
PRACTICE, 16.

1. The drawer of a bill payable to his own order, indorsed it to *J. S.*, and, on its being dishonoured by the acceptor, the indorsee sued the drawer, who paid the amount of the bill and costs, and on the bill being delivered up to him, he afterwards indorsed it to the plaintiff:—*Held*, that the latter might recover as against the acceptor. *Hubbard* v. *Jackson*, *M.* 8 *G.* 4. 11

2. *J. S.* drew a bill on the defendant (which the latter accepted for the accommodation of the former), and indorsed it to the plaintiff as his agent, in which character the plaintiff paid it away, on account of the drawer, for wine contracted to be purchased for him. Subsequently, the wine contract being rescinded, the holder of the bill refused to give it up until he had been paid a sum of 150*l.* which he alleged to be due to him from the drawer. The plaintiff engaged to pay it, received the bill, and sued the defendant as the acceptor:—*Held*, that he was not entitled to recover; although it was insisted that he had a lien on it to the amount he had promised to pay the holder, on its being delivered up to him. *Hallett* v. *Dewis*, *M.* 8 *G.* 4. 79

3. In an action for goods sold, it appeared that the defendant had accepted two bills of exchange drawn on him by the plaintiff, which covered the amount of his demand; that the plaintiff had indorsed these bills to Messrs. *A. & B.*; and that they were dishonoured by the defendant, and were in the possession of the indorsees at the time of the commencement of the action; but that the plaintiff sent his servant to them with a letter, a fortnight or three weeks before the trial, and that they gave him the bills, which he brought to the plaintiff:—*Held*, that, as the bills were in the plaintiff's possession at the time of the trial, he was entitled to recover for his original demand. *Burden* v. *Halton*, *H.* 8 & 9 *G.* 4. 223

4. The defendant, and C. M., his partner, having an account with the plaintiffs, who were bankers, C. M. gave them his promissory note for 2,000*l.*, that they might be allowed to overdraw the partnership account. C. M. afterwards required from the defendant his note for 1,000*l.*, to indemnify him for a moiety of the sum for which he had thus become separately responsible to the plaintiffs, and, having obtained it, he indorsed and gave it to the plaintiffs. The firm subsequently becoming indebted to the plaintiffs, for advances, to the amount of 1,800*l.*, they sued the defendant on his note:—*Held*, that they were entitled to recover. *Heywood* v. *Watson*, *H.* 8 & 9 *G.* 4. 268

5. In an action against the drawer of a bill, which was presented for payment at *N.* on *Saturday*, and dishonoured, it was proved that the post always left *N.* at half-past nine in the morning:—*Held*, that the holder had the whole of *Monday* to give the drawer notice of the dishonour. *Hawkes* v. *Salter*, *E.* 9 *G.* 4. 750

6. A mere delay by the holder of a bill of exchange to sue the acceptor, does not discharge the drawer or indorsers, the right to sue not being suspended. Therefore, where the executrix of a deceased acceptor verbally promised the holder to

pay the bill out of her own private income, and the latter agreed to give her time, provided interest were paid, and accordingly forbore to sue:—*Held*, that the drawer was not thereby discharged; the promise by the executrix being void, and the holder being under no binding engagement to give her time. *Philpot* v. *Briant*, *E.* 9 *G.* 4. 754

BILLS OF LADING.

See CARRIER, 2.

BLANKS.

See ARBITRATION, 2.

BOND.

See AFFIDAVIT TO HOLD TO BAIL, 2.
ARBITRATION, 1.
BAIL-BOND.
REPLEVIN-BOND.

BOOK.

See BRITISH MUSEUM.

BRITISH CONSUL.

See FINE.
PRACTICE, 23.

BRITISH MUSEUM.

1. *A.* having prepared a literary work, by his will directed it to be printed, and devised funds to his executors to defray the expenses of publication. After the death of *A.*, the work was published in parts, thirty copies being printed, for which there were only twenty-six subscribers (one part was sold), and the amount of the subscriptions being inadequate to pay the expenses of publication, the deficiency was defrayed by the executors out of the funds devised. The parts were not published at fixed intervals, but according to the state of those funds:—*Held*, that a part or number of a volume was not a periodical publication or *book* demandable by the public libraries or *British Museum*, under the statute 54 *Geo.* 3, c. 156. *British Museum* v. *Payne*, *E.* 9 *G.* 4. 415

BROKER.

See INSPECTION OF PAPERS, 1.

1. A subsequent ratification by a principal of a contract by an agent, is equivalent to a previous authority. Where, therefore, a broker made a contract in writing, for the sale of goods, not being authorized by one of his principals at the time, which the latter afterwards assented to:—*Held*, that the broker was an agent duly authorized to bind his principal, under the statute of frauds, at the time the contract was entered into. *Maclean* v. *Dunn*, *E.* 9 *G.* 4. 761
2. A broker delivered to a vendor bought and sold notes, written on one sheet of paper, and the day for payment of the goods was inserted at the end of the bought note only, but in those made out for the purchasers the day was inserted at the end of the bought as well as of the sold note:—*Held*, that as the bought and sold notes delivered to the vendor were both written on one sheet of paper, the whole must be considered as forming one contract; and, consequently, that there was no variance. *Ib.*

BUILDING-ACT.

See PARTY-WALL.

CARRIER.

1. A carrier is bound to deliver goods

entrusted to him at the place to which they are addressed; and, if he deliver them elsewhere, trover lies against him. *Secus*, if goods be stolen or lost. Where, therefore, the defendants, as carriers, had received a box at *Birmingham*, directed to *J. West*, 27, *Great Winchester Street, London*, and, on its being taken there, the house was found to be shut up, and no person of the name of *West* resided in the street; and, a week afterwards, the defendants received a letter from a person naming himself *West*, desiring that the box might be sent to him at an inn at *St. Alban's*; which the defendants accordingly did:—*Held*, that this was a misdelivery, for which they were liable in trover, although *West* was the person for whom the box was intended, the property in the goods not having passed to *West*, as he had obtained them from the plaintiff by fraud; and that it was properly left to the Jury to say, whether the defendants had caused the goods to be delivered in the due and ordinary course of business, and according to their duty as carriers. *Stephenson* v. *Hart*, *H.* 8 & 9 *G.* 4. 357

2. The plaintiffs shipped goods on board a steam vessel. The bill of lading contained the usual exceptions of the act of God, &c. &c. On the evening before the vessel was expected to sail, the boiler was, according to custom, filled with water; but, in consequence of the action of frost, a pipe communicating with it burst, and the water escaped into the hold, and damaged the goods. In an action against the owners, it was left to the Jury to say, whether or not, in leaving the boiler filled with water in frosty weather, the owners had been guilty of negligence. They found for the plaintiffs, and the Court refused to disturb the verdict. *Siordet* v. *Hall*, *E.* 9 *G.* 4. 561

3. The plaintiffs sent goods packed in a box by the defendant's waggon. The box was placed, with its lid outwards, at the tail of the waggon, which was left during several hours in the night standing in the road opposite an inn where the waggoner stopped, without any person to watch it. The box was forced open, and its contents abstracted. A notice was proved, limiting the carrier's responsibility to 5*l.*:—*Held*, that the carrier was guilty of gross negligence in leaving the waggon so exposed, and, consequently, liable for the loss. *Langley* v. *Brown*, *E.* 9 *G.* 4. 583

CERTIFICATE.

See PRACTICE, 12.

CHARTER-PARTY.

See ASSUMPSIT, 2.
TRESPASS, 4.

COPYRIGHT.

See LITERARY PROPERTY.

COGNOVIT.

See COSTS, 4.
PRACTICE, 6.

COHABITATION.

See EVIDENCE, 5.

CONDITION PRECEDENT.

See COVENANT, 1.

CONSTABLE.

See JUSTICE OF THE PEACE.

COSTS.

See DISCONTINUANCE.
PLEADING, 5.
PRACTICE, 5, 6, 15, 25, 26.
REGULA GENERALIS.
SET-OFF, 1.

1. An Irish Joint-Stock Company, incorporated by act of Parliament having sued a defendant in this Court, the proceedings were ordered to be stayed until the Company gave security for costs; it appearing that they had no available property in *England*. The *Limerick and Waterford Railway Company* v. *Frazer*, *M.* 8 *G.* 4. 23
2. A motion requiring a plaintiff to give security for costs, on the ground of his being resident abroad, must be made before plea pleaded; and it seems that such security cannot be required from a foreigner, a master of a vessel trading to this country, but having no fixed residence here. *Kasten* v. *Plaw*, *M* 8 *G.* 4. 30
3. Where notice of trial for the *Spring* Assizes had been given, and the cause made a *remanet* to the next *Summer* Assizes; and the defendant, having then attended with his witnesses, and found that the cause was not set down, afterwards applied for costs to be paid by the plaintiff for not proceeding to trial: —*Held*, that he was not entitled. *Gains* v. *Bilson*, *M.* 8 *G.* 4. 87
4. The plaintiffs, having been nonsuited, obtained a rule for a new trial, which was silent as to costs. The defendant, without going again to trial, gave the plaintiffs a *cognovit* to confess judgment, "and that the plaintiffs had sustained damages to the amount of one shilling, besides the costs to be taxed by the Prothonotary, and he should think the plaintiffs entitled." The Prothonotary having refused to tax the plaintiffs the costs of the nonsuit—The Court would not interfere—saying, that, as the parties, by the terms of the *cognovit*, had agreed to constitute the Prothonotary their arbitrator, they must be bound by his decision. *Elvin* v. *Drummond*, *M.* 8 *G.* 4. 88
5. The defendant was arrested in the *Palace Court* for 19*l.*, and removed the cause by *habeas* to this Court. The plaintiff recovered 2*l.* On motion by the defendant for his costs, under the statute 43 *Geo.* 3, c. 46, s. 3:—The Court held, that, the action having been *brought* in the *Palace Court*, they could not interfere. *Costello* v. *Cawley*, *H.* 8 & 9 *G.* 4. 315
6. The defendant was arrested for 30*l.* At the trial, it appearing that the plaintiff was indebted to the defendant in a small sum, a verdict was taken for the former for nominal damages, subject to a reference to an arbitrator for ascertaining the amount, and he found that 12*l.* only were due from the defendant to the plaintiff:—*Held*, that the defendant was not entitled to costs under the 43 *Geo.* 3, c. 46, s. 3, although he had tendered the sum awarded before the commencement of the action, as he ought to have pleaded the tender. *Bryson* v. *Simcox*, *H.* 8 & 9 *G.* 4. 355
7. In an action brought to recover the balance of an account, the parties agreed that the amount should be referred to two arbitrators, who, in settling the balance due, were to be guided by the decision of a Jury, in regard of a certain cargo of cotton shipped by the plaintiffs, the cost of which formed one of the items. The Jury found, that the plaintiffs were not entitled to charge the defendants with the cost of the cotton; and the arbitrators, after excluding such cost, pursuant to

the verdict, found a certain sum to be due to the plaintiffs. The Prothonotary, on taxation, refused to allow the plaintiffs the costs of the trial which applied to the cotton:—*Held*, that he was right in so doing. *Fairlie* v. *Parker*, *E.* 9 *G.* 4. 438

8. The plaintiffs had applied for and obtained a writ of *mandamus*, under the statute 13 *Geo.* 3, c. 63, s. 44, for the examination of witnesses in *India*, and the writ and depositions were returned to this country; but the defendants did not join in the application for the writ, nor examine or cross-examine witnesses under it; and the plaintiffs obtained a verdict:—*Held*, that they were not entitled to the costs attending the writ, or of the office copies of the depositions. *Ibid.*

COVENANT.

1. By an indenture, reciting that *A.* had for many years carried on the business of a fish-factor and salesman, and had an interest in certain fisheries in *Scotland*, it was witnessed that he had, in consideration of the covenants thereinafter contained on the part of *B.*, sold and assigned to him all that branch of his trade which consisted of the sale, &c. of dried and cured fish, *and also* his interest in the fisheries of *Scotland;* and *A.* further covenanted that he would not in any manner interfere with that branch of the business so assigned; and *B.* covenanted that, in consideration of the assignments and covenants of *A.*, he would pay him an annuity of 250*l.* In an action of debt for non-payment of the annuity, *B.* pleaded in bar, that *A.* did interfere with the trade assigned by him to *B.*:—*Held*, bad, on demurrer, as the covenant by *B.* to pay the annuity, and that by *A.* not to interfere with the trade, were independent and distinct covenants, for the breach of either of which separate actions might be maintained; and that *A.'s* covenant not to interfere could not be considered as a condition precedent, as it formed only a part of the consideration for the annuity. *Carpenter* v. *Cresswell*, *M.* 8 *G.* 4. 66

2. In *covenant*, the declaration stated, that one *C. B. was seised* of an undivided moiety of certain premises, and that by his will he devised them to the plaintiffs, and their heirs, and afterwards died *so seised.* It was urged in arrest of judgment, that the declaration did not contain any sufficient allegation of title in *C. B.*, the devisor, it being stated merely that he was *seised* generally:—*Held*, that the declaration was sufficient after verdict. *Harris* v. *Bevan*, *E.* 9 *G.* 4. 633

COVERTURE.

See DEVISE.

DEBT.

See PLEADING, 2.
PRACTICE, 13.

DEMURRAGE.

See ASSUMPSIT, 2.
INSPECTION OF PAPERS, 2.

DEMURRER.

See PLEADING, 1, 2, 3, 6, 7.

DEMURRER-BOOK.

1. Whereas great expense is often unnecessarily incurred in making up demurrer-books, from setting forth those parts of the pleadings to which the demurrers do not apply: It is therefore ordered, that, from and after the end of this pre-

sent *Hilary* Term, when there shall be a demurrer to part only of the declaration, or other or subsequent pleadings, those parts only of the pleadings to which such demurrer relates, shall be copied into the demurrer-books; and, if any other parts shall be copied therein, the Prothonotary shall not allow the costs thereof on taxation, either as between party and party, or attorney and client. *Reg. Gen. H.* 8 & 9 *G.* 4. 401

DEPOSITIONS.

See BANKRUPT, 2.

DEVISE.

1. A testatrix devised lands to *C. S.*, and his heirs, in trust, to and for the sole and separate use of her daughter, *S. S.*, and to convey, assign, and assure, the same to *S. S.*, her heirs and assigns, for ever, free from and independent of the debts, &c., of any present or any future husband, and to *empower and permit* her to take and receive the rents, &c., and to give receipts for the same, *or to appoint* any person to receive them, as if she were sole and unmarried. *S. S.* afterwards made a will, whereby she devised the lands to her husband, for life, with remainder over, and died:—*Held*, that the legal estate vested in the trustee during her life, and that the devise by *S. S.*, during her coverture, was void. *Doe* d. *Stevens* and *Dumée* v. *Scott*, *H.* 8 & 9 *G.* 4. 317

DISCLAIMER.

See EJECTMENT, 3.

DISCONTINUANCE.

1. The plaintiff having commenced an action against the defendant, it was agreed in writing that he should discontinue it, and the defendant engaged to pay the legal costs incurred by the plaintiff in the suit, as between party and party. In an action to recover the amount of such costs after taxation, it was averred in the declaration that the plaintiff had discontinued the action:—*Held*, that such averment could not be supported without proof of a rule to discontinue. *Fanshawe* v. *Heard*, *H.* 8 & 9 *G.* 4. 191.

DISTRESS.

See JUSTICE OF THE PEACE.

1. One of several joint-tenants may sign a warrant of distress, and appoint a bailiff to distrain for rent due to all, unless the others *expressly dissent*. *Robinson* v. *Hoffman*, *E.* 9 *G.* 4. 474

DISTRINGAS.

See PRACTICE, 24.

EJECTMENT.

1. The defendant held certain premises of the lessor of the plaintiff, under an agreement for a lease for seven years. No lease was executed; but the defendant continued to occupy under the agreement until the expiration of the term, when the landlord brought an action of ejectment against him, without having given him a notice to quit:—*Held*, that such notice was unnecessary. *Doe* d. *Tilt* v. *Stratton*, *H.* 8 & 9 *G.* 4. 183
2. In ejectment, the plaintiff declared for twenty messuages, *twenty tenements*, &c., and, after verdict, and a writ of error brought in the *King's Bench*, this Court allowed the record to be amended, by striking out the words "twenty tenements." *Doe* d. *Lawrie* and *Glass* v. *Dyball*, *H.* 8 & 9 *G.* 4. 330

3. The defendant held premises under a tenant for life, on whose death possession was claimed, and rent demanded, by the heir-at-law of the devisor; whereupon the defendant wrote to the attorney of the heir-at-law, stating that he held as tenant to *J. S.* (the husband of the tenant for life), in right of his wife; that he had never considered the claimant as the landlord of the house; that he should be ready to pay the arrears to any person who should be proved to be heir-at-law; but that he must decline taking upon himself to decide upon the claim made on him, without more satisfactory proof in a legal manner:—*Held*, that this letter amounted to a disclaimer of the title of the heir-at-law, and that he might maintain ejectment against the tenant, without giving him a previous notice to quit. *Doe* d. *Calvert* v. *Frowd*, *E.* 9 *G.* 4. 480

ENTRY, WRIT OF.

See PLEADING, 3.
RECOVERY, 1.

ERROR.

1. Bail in error required by the stat. 6 *Geo.* 4, c. 96, s. 1 (which was passed to prevent frivolous writs of error) cannot be dispensed with, although there be error in form on the face of the record. *Wadsworth* v. *Gibson*, *E.* 9 *G.* 4. 501

ESCAPE.

1. A serjeant-at-mace of the city of *London* received a mandate from the *Mayor's Court*, to arrest *A. B.* and *C. D.* His deputy arrested *A. B.* (*C. D.* being out of the country), and took him to a lock-up-house, the keeper of which allowed him to go at large. Two responsible persons were afterwards tendered to the clerk of the bails of the *Mayor's Court*, for *A. B.*, whom he refused to receive unless they would become bail for *C. D.* also; it being the practice of that Court, if two or more persons be sued jointly, and one only be arrested, to require from that one bail for all. In an action by the parties who had obtained the mandate, against the serjeant-at-mace for the escape of *A. B.*:—*Held*, that he was liable, as he was bound to keep him in safe custody; and that the refusal of the officer to take the bail was no answer to the action. *De Vaux* v. *Sewell*, *H.* 8 & 9 *G.* 4. 216

2. On demurrer to a declaration against the sheriff, for an escape on mesne process, assigning for cause, that it was not alleged that any affidavit of the plaintiff's cause of action was made or filed:—*Held*, that such allegation was unnecessary, it being averred that the writ was *duly marked or indorsed for bail* before it was delivered to the sheriff. *Wilcoxon* v. *Nightingale*, *H.* 8 & 9 *G.* 4. 279

ESSOIN.

See PRACTICE, 1.

EVIDENCE.

See BANKRUPT, 2, 6.
DISCONTINUANCE.
EXAMINATIONS.
FRAUDS, STATUTE OF.
PLEADING, 4.
PRACTICE, 8.

1. The plaintiff declared against an attorney, for negligence in not causing an application to be made to the Court to set aside proceedings in an action brought against him, on the ground that he had never been served with process, *in con-*

sequence whereof judgment was signed against him by default, and afterwards final judgment was sued out, and execution issued thereon:—*Held*, that it was incumbent on the plaintiff to produce an examined copy of the record, to prove both the judgments; and that proof of the entry of the judgment by default in the Prothonotary's book, and the inquisition, with the Prothonotary's *allocatur*, were not sufficient evidence of such judgment. *Godefroy* v. *Jay*, *H.* 8 & 9 *G.* 4. 236

2. In an action for a breach of promise of marriage, the promises declared on, were, *first*, to marry on request; *secondly*, the like, assigning for breach that the defendant had married another; *thirdly*, to marry within a reasonable time; and, *lastly*, to marry generally. The proof was, that the defendant had said that he would marry the plaintiff in *July*:—*Held*, that, notwithstanding this variance, the Jury were warranted by the evidence in inferring a promise to marry generally, and that the plaintiff was entitled to recover on the last count of the declaration. *Phillips* v. *Crutchley*, *H.* 8 & 9 *G.* 4. 239
3. The plaintiff declared on a promise by the defendants to pay over to him the proceeds of a foreign bill of exchange negotiated by them on his account:—*Held*, that he was not bound to produce the bill, but might give parol evidence of its contents. *Hunt* v. *Alewyn*, *E.* 9 *G.* 4. 433
4. Examinations of parties before commissioners of bankrupt, are evidence in actions against them by the assignees, unless such examinations were obtained by imposition, or under duress. *Robson* v. *Alexander*, *E.* 9 *G.* 4. 448
5. A woman, who lives with a man, uses his name, and passes as his wife, is a competent witness on his behalf, in an action brought against him; as the mere circumstance of cohabitation only goes to her credit, not to her competency. *Batthews* v. *Galindo*, *E.* 9 *G.* 4. 565
6. In order to shew a witness interested, it is necessary to prove that he has an *immediate* interest in the event of the suit, or must derive a *certain* benefit from its determination one way or the other. Therefore, in trover for a barge which the plaintiffs claimed under a purchase from one *B.*, and which the defendants also claimed under a purchase from one *W.*, who they alleged to have bought it from *B.*, *B.* was called as a witness, when, on an objection being taken to his competency, on the ground of interest, he was released by joint and several releases from the defendants and *W.*:—*Held*, that the release by *W.* rendered *B.* a competent witness. *Radburn* v. *Morris*, *E.* 9 *G.* 4. 648
7. The plaintiffs' clerk proved that the letter giving notice of the dishonour of a bill was copied by him on the *Monday* into a book kept for that purpose, and said, that, by the course of business at their house, all letters copied into that book were sent to the Post-office in the evening of the day on which they were so copied, but that he himself did not carry the letter in question to the post, it being the duty of one of the other clerks to do so:—*Held*, not sufficient evidence that the letter was sent. *Hawkes* v. *Salter*, *E.* 9 *G.* 4. 750

EXAMINATIONS.

1. Examinations of parties before commissioners of bankrupt, are evidence in actions against them by

the assignees, unless such examinations were obtained by imposition, or under duress. *Robson* v. *Alexander*, *E.* 9 *G.* 4. 448

EXECUTION.

See PLEADING, 13.
PRISONER.
PRACTICE, 22.
TRESPASS, 3.
TROVER, 5.

EXECUTOR.

See ADMINISTRATOR.
LITERARY PROPERTY.

1. The plaintiff and three others, being residuary legatees under the will of one *T. P.*, the defendants, as the executors named in the will, accounted with them; and having paid to the latter the respective sums due to them thereon, took from them, and from the plaintiff, a release, but did not pay the plaintiff his share, he having consented to allow it to remain in their hands: —*Held*, that the money not being retained by the defendants in their character of executors, the plaintiff was entitled to recover it in an action at law. *Gregory* v. *Harman*, *H.* 8 & 9 *G.* 4. 209
2. No action can be maintained against a party as executor, until he has taken upon himself to act as such, or has proved the will. Therefore, where a testator died abroad more than six years before the commencement of the suit, but his executor in this country had not proved the will, nor in any manner acted as executor until *within* six years:—*Held*, that the statute of limitations was no bar. *Douglas* v. *Forrest*, *E.* 9 *G.* 4. 663
3. A mere delay by the holder of a bill of exchange to sue the acceptor, does not discharge the drawer or indorsers, the right to sue not being suspended. Therefore, where the executrix of a deceased acceptor verbally promised the holder to pay the bill out of her own private income, and the latter agreed to give her time, provided interest were paid, and accordingly forbore to sue:—*Held*, that the drawer was not thereby discharged, the promise by the executrix being void, and the holder being under no binding engagement to give her time. *Philpot* v. *Briant*, *E.* 9 *G.* 4. 754

FEME COVERT.

See DEVISE.

FINE.

See RECOVERY.

1. A *British* consul at a foreign port has no authority, under the statute 6 *Geo.* 4, c. 87, s. 20, to administer an oath of the acknowledgment of a party levying a fine. *Hutchinson*, *Ex parte*, *E.* 9 *G.* 4. 559

FOREIGN JUDGMENT.

1. *Assumpsit* lies in the Courts at *Westminster*, on a *Scotch* decree, obtained in absence against a native of *Scotland*, for a debt contracted in *Scotland*. *Douglas* v. *Forrest*, *E.* 9 *G.* 4. 663
2. Where a *Scotch* decree adjudges interest to be paid, but does not fix the time from which it is to run, it is payable from the day of citation. *Ibid.*

FOOTWAY.

See ACT OF PARLIAMENT.

FRAUDS, STATUTE OF.

See PLEADING, 7.

1. The defendant agreed with the plaintiff, by parol, that, if she would take a lease of certain premises be-

longing to him, he would pay her 20*l.* towards putting them in repair. The lease was afterwards executed and accepted by the plaintiff, who took possession and repaired the premises, and, on payment of the first quarter's rent, demanded the sum of 20*l.* from the defendant, who said he would pay it when the next quarter's rent became due:—*Held*, that such acknowledgment of that sum being due, raised a moral obligation on the defendant to pay; and that the plaintiff was entitled to recover upon an account stated, although it was objected, that parol evidence as to the terms on which the lease was to be granted was inadmissible by the statute of frauds. *Seago* v. *Deane*, *H.* 8 & 9 *G.* 4. 227

2. A subsequent ratification by a principal of a contract by an agent, is equivalent to a previous authority. Where, therefore, a broker made a contract in writing for the sale of goods, not being authorized by one of his principals at the time, which the latter afterwards assented to:—*Held*, that the broker was an agent duly authorized to bind his principal under the statute of frauds, at the time the contract was entered into. *Maclean* v. *Dunn*, *E.* 2 *G.* 4. 671

FREIGHT.

See INSURANCE, 1.

GENERAL ISSUE.

See PLEADING, 4, 10.
PRACTICE, 8, 21.

GOODS SOLD & DELIVERED.

See BILLS OF EXCHANGE, 3.

HUSBAND AND WIFE.

See EVIDENCE, 5.

IMPROVED RENT.

See PARTY-WALL.

INDENTURE.

See PLEADING, 2.

INNUENDO.

See LIBEL, 3.

INSOLVENT DEBTORS.

See ANNUITY.
PRISONER.

1. The ultimate assignees of an insolvent debtor take all the estate which before vested in the provisional assignee. Therefore, where an insolvent, after filing his petition, and after executing an assignment to the provisional assignee, but before the day of hearing, and before the assignment by the provisional to the subsequently appointed assignees, died:—*Held*, that his estate passed to the latter. *Willes* v. *Elliott*, *M.* 8 *G.* 4. 19

2. The grantor of an annuity, discharged under the Insolvent Debtors' Act, 1 *Geo.* 4, c. 119, is liable to be *arrested* by his surety for arrears which became due subsequently to his discharge, and which the surety was obliged to pay. Where, therefore, a defendant had been *arrested* under such circumstances, the Court refused to discharge him out of custody, on a motion to enter a common appearance, but left him to defend the action; although the surety had received a dividend, and the grantee had proved the value of the annuity, which was ascertained by the commissioners in pursuance of the 10th section of the statute. *Freeman* v. *Burgess*, *M.* 8 *G.* 4. 91

INSPECTION OF PAPERS.

1. In an action by the owners of a

ship against a broker employed by them to procure a cargo, the Court refused to order the latter to allow the former to inspect or take a copy of a letter received by him from a correspondent abroad, although he acted as such broker at the time. *Rowe* v. *Howden*, *H.* 8 & 9 *G.* 4. 334

2. In an action for freight and demurrage, by ship-owners against the charterer, the Court will not grant the latter an inspection of the log-book kept during the voyage. *Rundle* v. *Beaumont*, *H.* 8 & 9 *G.* 4. 396

INSURANCE.

See ASSUMPSIT, 3.

1. In an action against an underwriter on a policy of assurance on freight, where the vessel, whilst taking in cargo at the *Cape of Good Hope*, for her voyage from thence to the port of *London*, was forced, through stress of weather, from her moorings, driven on shore, and sunk in the sand; and, her cargo being taken out, she was found to be so much damaged and shattered that it was deemed advisable to sell her; and she was accordingly sold by public auction as a mere wreck; but, being subsequently repaired by the purchaser, she had made two or three voyages to this country:—*Held*, that an abandonment of the freight was unnecessary. *Mount* v. *Harrison*, *M.* 8 *G.* 4. 14

2. A policy of assurance contained the following clause: "The ship, &c., goods, and merchandizes, &c., for so much as concerns the assured and assurers in this policy, are and shall be valued at five tierces coffee, valued at 27*l.* *per* tierce, say 135*l.* *This policy to be deemed sufficient proof of interest.*" Held, that the policy was void, under the statute 19 *Geo.* 2, c. 37, s. 1. *Murphy* v. *Bell*, *E.* 9 *G.* 4. 493

INTEREST.

1. Where a *Scotch* decree adjudges interest to be paid, but does not fix the time from which it is to run, it is payable from the day of citation. *Douglas* v. *Forrest*, *E.* 9 *G.* 4. 663

JOINT-ACTION.

See PLEADING, 1.
TRESPASS, 1.

JOINT-CONVERSION.

See TROVER, 6.

JOINT-TENANTS.

1. One of several joint-tenants may sign a warrant of distress, and appoint a bailiff to distrain for rent due to all, unless the others *expressly dissent*. *Robinson* v. *Hoffman*, *E.* 9 *G.* 4. 474

JUDGMENT.

See SET-OFF.

JUSTICE OF THE PEACE.

1. In an action against two Justices of the Peace, for illegally convicting the plaintiff, and issuing a warrant of distress against his goods, the notice of action stated the warrant to have been *directed to A. B.*, and, when produced at the trial, it was found to have been *directed to C. D., constable of H.*:—*Held*, a fatal variance, although *A. B.* executed the warrant. *Aked* v. *Stocks*, *H.* 8 & 9 *G.* 4. 346

LANDLORD AND TENANT.

See EJECTMENT.

LIBEL.

1. The plaintiff being about to be elected preacher to a congregation of dissenters, one of its members called on the defendant to make enquiries as to his character; the defendant mentioned some circumstances in a manner reflecting very grossly on the plaintiff, and imputing to him forgery; which turning out to be unfounded, the deacons of the congregation sent a circular to each of its members, with a view to remove the effect of those aspersions; and the defendant, in answer, wrote a letter to them, in which, after repeating what he had before said, he inserted what he alleged to be the opinion of counsel, but which was, in fact, only part of such opinion, he having purposely withheld part of it, which was a qualification of that set out. The Jury having found that the libel imputed forgery to the plaintiff, but that the defendant was not actuated by *express* malice, gave a verdict for the plaintiff, with *50l.* damages. On motion for the defendant to have it entered for him on the general issue, and for the plaintiff on the special pleas, on the ground, that, the Jury having negatived express malice, the action could not be maintained; and that the letter containing the libel was a privileged communication: —and on motion by the plaintiff for a new trial, on the ground, that, from the lapse of time since the bill was given, and the defendant's withholding that part of the opinion which was favourable to the plaintiff's case, there was sufficient proof of *express* malice, and that the Jury ought to have found it: — The Court refused to disturb the verdict. *Blackburn* v. *Blackburn, M.* 8 *G.* 4. 33

2. In an action for a libel contained in a letter written in *Buckinghamshire*, the Court allowed the *venue* to be changed from *London* to that county, on the usual affidavit that the plaintiff's *cause* of action (if any) arose there; it not appearing that the letter was published or circulated in a different county: and—*Held*, that the affidavit was sufficient, although the declaration contained counts for slander, as well as for the libel. *Tallent* v. *Morten, H.* 8 & 9 *G.* 4. 188

3. In an action for a libel, the declaration,—after reciting, that divers persons had been associated together, under the name of "The Society of Guardians for the Protection of Trade against Swindlers and Sharpers;" and that the defendant, under colour of being the secretary of the said society, had, from time to time, published, and was accustomed to publish, certain printed reports, for the purpose of denoting to the members of the said society the names of such persons as were deemed swindlers and sharpers, and improper persons to be proposed to be ballotted for as members of the said society—set out the following libel, of and concerning the plaintiff:—"Society of Guardians for the Protection of Trade against Swindlers and Sharpers; I (meaning the defendant) am directed to inform you, that *G.* (meaning the plaintiff) and *C.*, are reported to this society as improper to be proposed to be ballotted for as members thereof (meaning that the plaintiff was a swindler and sharper, and an improper person to be a member of the said society)." After verdict for the plaintiff, and writ of error brought: —*Held*, that the innuendo was not warranted by the libel; and that the words of the libel, unexplained by introductory matter, were not ac-

tionable. *Goldstein* v. *Foss*, *H.* 8 & 9 *G.* 4. 402

4. The defendant, as surety for one *Æ. M.*, entered into a bond for the performance of an award, on which he was sued by the plaintiff, and the payment of which he resisted, and instituted proceedings to set it aside. Pending these suits, the plaintiff advertized the bond for sale as a common money bond; whereupon the defendant wrote to the auctioneer, apprising him of the circumstances under which the bond was given, and saying that it was of no value, and averring that the object of the plaintiff in putting it up to sale, was, "either to extract money from the pocket of an unwary purchaser, or, by the threat of publication, to extort money from *him*." The defendant publicly read and circulated the letter in the sale-room:—*Held*, libellous, without proof of *express malice*. *Robertson* v. *Macdougall*, *E.* 9 *G.* 4. 692

LIEN.

See BILLS OF EXCHANGE, 2.
SET-OFF, 2.
TRESPASS, 4.
TROVER, 4.

LIMITATIONS, STATUTE OF.

1. No action can be maintained against a party as executor, until he has taken upon himself to act as such, or has proved the will: Therefore, where a testator died abroad more than six years before the commencement of the suit, but his executor in this country had not proved the will, nor in any manner acted as executor until *within* six years:—*Held*, that the statute of limitations was no bar. *Douglas* v. *Forrest*, *E.* 9 *G.* 4. 663

2. The plaintiff having lent the defendant a sum of money, took from him the following memorandum:—"I. O. U. one hundred pounds,
Chas. Robarts.
30th *July*, 1821."
"*August* 17th, received fifty pounds.
Chas. Robarts."
The last item alone was *infra sex annos*:—*Held*, that it did not amount to an acknowledgment of the existence of the prior debt, so as to take it out of the statute of limitations. *Robarts* v. *Robarts*, *E.* 9 *G.* 4. 487

LITERARY PROPERTY.

1. *A.* having prepared a literary work, by his will directed it to be printed, and devised funds to his executors to defray the expenses of publication. After the death of *A.*, the work was published in parts, thirty copies being printed, for which there were only twenty-six subscribers, (one part was sold), and the amount of the subscriptions being inadequate to pay the expenses of publication, the deficiency was defrayed by the executors out of the funds devised. The parts were not published at fixed intervals, but, according to the state of those funds:—*Held*, that a part or number of a volume was not a periodical publication or *book* demandable by the public libraries or *British Museum*, under the statute 54 *Geo.* 3, c. 156. *British Museum* v. *Payne*, *E.* 9 *G.* 4. 415

LOG-BOOK.

See INSPECTION OF PAPERS.

MAGISTRATE.

See JUSTICE OF THE PEACE.

MALICE.

See LIBEL, 1, 4.

MANDAMUS.

See PRACTICE, 18.

MARRIAGE, BREACH OF PROMISE OF.

1. In an action for a breach of promise of marriage, the promises declared on were, *first*, to marry on request; *secondly*, the like, assigning for breach, that the defendant had married another; *thirdly*, to marry within a reasonable time; and, *lastly*, to marry generally. The proof was, that the defendant had said that he would marry the plaintiff in *July*:—*Held*, that, notwithstanding this variance, the Jury were warranted by the evidence in inferring a promise to marry generally; and that the plaintiff was entitled to recover on the last count of the declaration. *Phillips* v. *Crutchley*, *H.* 8 & 9 *G.* 4. 239

MASTER AND SERVANT.

1. A person occasionally employed by the defendant as his servant, being sent out by him on his business, took the horse of another person in whose service he also worked, and, in going, rode over the plaintiff. At the trial, it was left to the Jury to say, whether or not the horse was taken by the servant with the *implied* consent or authority of the defendant; and they having found a verdict for the plaintiff, the Court refused to grant a new trial. *Goodman* v. *Kennell*, *H.* 8 & 9 *G.* 4. 241

MAYOR'S COURT.

See ESCAPE.

MEMORANDA, 1, 179.

MISNOMER.

See PLEADING, 1.
TRESPASS, 1.

MONEY HAD AND RECEIVED.

See ADMINISTRATOR.
EXECUTOR, 1.

MUSEUM, BRITISH.

See LITERARY PROPERTY.

NEGLIGENCE.

See CARRIER.

NEW TRIAL.

See PRACTICE, 6.

NONSUIT.

See PRACTICE, 6.

NOTICE BY CARRIERS.

See CARRIER, 3.

NOTICE OF ACTION.

See JUSTICE OF THE PEACE.

NOTICE OF TRIAL.

See PRACTICE, 5.

NOTICE TO DISPUTE BANKRUPTCY.

See PRACTICE, 21.

NOTICE TO QUIT.

See EJECTMENT, 1, 3.

OUTLAWRY.

1. A party outlawed can only appear in Court for the purpose of reversing his outlawry. Where, therefore, a defendant, the grantor of an annuity, who had been outlawed in an action in the Court of *King's Bench* for arrears, applied to this Court to set aside the securities, on the ground of an illegality in the grant in the first instance:—*Held*, that he could not be heard. *Loukes Holbeche*, *M.* 8 *G.* 4. 126

PALACE COURT.

See COSTS, 4.
PRACTICE, 15.

PARTNERS.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PARTY-WALL.

1. The defendant held land under a lease from *J. S.*, and underlet a portion of it, at an advanced rent, to one *G.*, who built thereon, using the party-wall of the plaintiff:—*Held*, that the defendant was the owner of the *improved rent*, within the meaning of the building act, and liable to a moiety of the expense of building the party-wall:—*Held*, also, that the account or estimate required by the act to be given within *ten days* after the building of the wall, does not apply to the case of a new wall to a house having none adjoining it; but only where an old one is removed. *Collins* v. *Wilson*, *E.* 9 *G.* 4. 454

PETITIONING CREDITOR.

See BANKRUPT, 6.

PLEADING.

See ACTION ON THE CASE, 3.
ARBITRATION, 1.
EJECTMENT, 2.
EVIDENCE, 1, 2.
LIBEL, 3,
MARRIAGE, BREACH OF PROMISE OF.
PRACTICE, 8, 13, 16, 17, 18, 26.
REPLEVIN.
TRESPASS, 1.

1. To a joint action of trespass against four defendants, one of them pleaded a *misnomer* in abatement, and concluded by praying judgment "*of the writ, and that the same may be quashed, &c.*":—*Held*, bad on general demurrer, as the *misnomer* only operated to abate the writ *as to the party misnamed.* *Wade* v. *Stiff*, *M.* 8 *G.* 4. 26

2. By an indenture, reciting that *A.* had for many years carried on the business of a fish-factor and salesman, and had an interest in certain fisheries in *Scotland*, it was witnessed that he had, in consideration of the covenants thereinafter contained on the part of *B.*, sold and assigned to him all that branch of his trade which consisted of the sale, &c., of dried and cured fish, *and also* his interest in the fisheries in *Scotland;* and *A.* further covenanted that he would not in any manner interfere with that branch of the business so assigned; and *B.* covenanted that, in consideration of the assignments and covenants of *A.*, he would pay him an annuity of 250*l.* In an action of debt for non-payment of the annuity, *B.* pleaded in bar, that *A.* did interfere with the trade assigned by him to *B.*:—*Held*, bad, on demurrer, as the covenant by *B.* to pay the annuity, and that by *A.* not to interfere with the trade, were independant and distinct covenants, for the breach of either of which separate actions might be maintained; and that *A.'s* covenant not to interfere could not be considered as a condition precedent, as it formed only a part of the consideration for the annuity. *Carpenter* v. *Cresswell*, *M.* 8 *G.* 4. 66

3. In a writ of entry *sur abatement* in the *cui* and *per*, the demandant, by his count, demanded *six* messuages, *six* mills, *two* barns, *two* stables, *six* out-houses, *six* yards, *two* gardens, *two* orchards, *one hundred* acres of arable land, *one hundred* acres of meadow land, *one hundred* acres of pasture land, *one hundred* acres of wood land, *one hundred* acres of underwood, *one hundred* acres of land

covered with water, and *one hundred* other acres of other land, with the appurtenances; and stated his title, as cousin and heir of one *R. S.*, upon whose death one *R. T.* abated, and devised the estate to *R. D. C.*, and *S.*, his wife, by whom the tenant had entry. The tenant, "as to *the said messuages*, mills, barns, stables, out-houses, gardens, orchards, and *thirty* acres of land, *thirty* acres of meadow, and *thirty* acres of pasture, with the appurtenances, *parcel of the said land in the said count mentioned*," said, "that the demandant ought not to have his seisin of the messuages or tenements, with the land and appurtenances, in the said count mentioned, *or any part thereof*," and pleaded, that *R. S.*, being seised of the messuages, &c., devised the same to *R. T.*, in fee; that *R. T.* became seised of the messuages, and afterwards devised them to *S.*, the wife of *R. D. C.*, and her heirs, for ever; that *R. D. C.* and *S.* his wife, in right of the said *S.*, thereby became seised in fee, and afterwards levied a fine to the tenant, with proclamations, "of all the said tenements in the introductory part of the plea mentioned, and the land whereon the said buildings now stand, *by the description of four messuages, one cloth mill, four barns, four stables, one wharf, four curtilages, four gardens, four orchards, thirty acres of land, thirty acres of meadow, and thirty acres of pasture, with the appurtenances*, as by the said fine and proclamations made thereon, *now remaining of record* in the Court of the *Bench* here, more fully appears." The tenant then averred, that, after the levying of the fine, he entered into the messuages, &c.; and concluded his plea, by praying judgment, "if the demandant ought to have his seisin *of and in the messuages or tenements*, with the land and appurtenances, *in the said count mentioned*." To this plea the demandant demurred specially, assigning for causes;—*first*, that the plea was double, for alleging the *devise* by *R. S.* to *R. T.*, and by *R. T.* to *S.*, the wife of *R. D. C.*, and also the *fine* levied by *R. D. C.* and *S.*, his wife, to the tenant; either being a sufficient answer;—*secondly*, that though the plea began by selecting *part* only of the premises mentioned in the count, it averred that the demandant ought not to have seisin *of the messuages, &c., or any part thereof*, and concluded by praying judgment of *all*;—*thirdly*, that the *fine*, as pleaded, appeared not to have been levied of *all* the tenements in the introductory part of the plea mentioned, and as to which the plea was pleaded;—and, *lastly*, that the plea did not verify the fine *by the record thereof*, but concluded with a general verification and prayer of judgment; the tenant thereby attempting to put in issue matter of record, and make it triable *per pais*:—*Held*, that the plea was good. *Rowles*, demandant; *Lusty*, tenant, *M.* 8 *G.* 4. 102

4. The Court refused to allow the defendant, in an action of *assumpsit*, to plead the general issue, and also several special pleas, that the money mentioned in the declaration was due only for differences arising out of stock-jobbing transactions; as such matter might be given in evidence under the former plea. *Rosset* v. *King*, *M.* 8 *G.* 4. 145

5. The plaintiff having commenced an action against the defendant, it was agreed in writing that he should discontinue it, and the defendant engaged to pay the legal costs incurred by the plaintiff in the suit,

as between party and party. In an action to recover the amount of such costs after taxation, it was averred in the declaration that the plaintiff had discontinued the action:—*Held*, that such averment could not be supported without proof of a rule to discontinue. *Fanshawe* v. *Heard*, *H.* 8 & 9 *G.* 4. 191

6. On demurrer to a declaration against the sheriff, for an escape on mesne process, assigning for cause, that it was not alleged that any affidavit of the plaintiff's cause of action was made or filed:—*Held*, that such allegation was unnecessary, it being averred that the writ was *duly marked or indorsed for bail* before it was delivered to the sheriff. *Wilcoxon* v. *Nightingale*, *H.* 8 & 9 *G.* 4. 279

7. The plaintiff declared, that, before the making of the defendant's promise, *A. P.* had been arrested and was in custody at the suit of *T. H.* and *J. H.*, and that, in consideration that they would cause her to be discharged, and take a bill of exchange, to be drawn on *A. P.*, for the amount of the debt due to *T. H.* and *J. H.*, the defendant undertook to pay the bill in case it should be dishonoured by *A. P.* Pleas—*first*, that the defendant's promise was a special promise for the debt of another, and that no agreement relating to the cause of action, nor any memorandum or note thereof, wherein the consideration for the promise was stated or shewn, was in writing, or was signed by the defendant, or by any other person by him authorized;—and, *secondly*, that, before *A. P.* was indebted to *T. H.* and *J. H.*, and from thence until the making of the promise, *A. P.* was the wife of one *W. P.*, and that he was still alive. On demurrer, assigning for cause, that the pleas amounted to the general issue and tended to prolixity of pleading:—*Held*, good, as there was no denial of the plaintiff's right of action, or of the facts stated in the declaration, but was matter of defence in law, arising out of the statute of frauds. *Maggs* v. *Ames*, *H.* 8 & 9 *G.* 4. 294

8. In an action against the drawer of a bill of exchange, he pleaded the delivery of twenty pipes of port wine in satisfaction:—The Court refused to allow the plaintiffs to sign judgment as for want of a plea, although it was sworn that the plea was altogether false. *Smith* v. *Backwell*, *H.* 8 & 9 *G.* 4. 338

9. In *covenant*, the declaration stated, that one *C. B. was seised* of an undivided moiety of certain premises, and that by his will he devised them to the plaintiffs, and their heirs, and afterwards died *so seised*. It was urged in arrest of judgment, that the declaration did not contain any sufficient allegation of title in *C. B.*, the devisor, it being stated merely that he was *seised* generally:—*Held*, that the declaration was sufficient after verdict. *Harris* v. *Beavan*, *E.* 9 *G.* 4. 633

10. To a declaration in *assumpsit*, containing a count on a bill for 857*l.* 10*s.*, with a count for goods sold, and the usual money counts, the defendant pleaded—as to the *second* and subsequent counts, except as to the sum of 857*l.* 10*s.*—*non assumpsit*; and—as to the said sum of 857*l.* 10*s.*—that, after the making of the promises, and before the commencement of the suit, he drew a bill on *F. L. & Co.* for that sum, and indorsed it to the plaintiffs, to whom the defendant was still liable on it; and—as to the promise in the *first* count mentioned—that, before the said bill became due, the plaintiffs indorsed it to third per-

sons, to whom the defendant was still liable. On an affidavit that the plea was *false*:—The Court ordered it to be struck out, unless the defendant would consent to withdraw it, and undertake to plead issuably within *two* days, and to take short notice of trial for the Sittings after the Term. *Jones* v. *Studd*, *E.* 9 *G.* 4. 643

11. The plaintiff, in the *first* and *third* counts of his declaration, alleged, that, at the time of making the agreement with the defendant, he was possessed of a house for a certain term of years, *to expire on the 25th December*, 1856; and, in the *second*, that he was entitled to the term *under and by virtue of a certain contract*. The proof was, that the plaintiff was possessed of a term of *twelve* years only; and there was *no* contract or agreement under which he was at that time entitled to an extension of the term:—*Held*, that this was a fatal variance, although it appeared that the plaintiff had since become possessed of a lease to expire in *December*, 1856. *Routledge* v. *Grant*, *E.* 9 *G.* 4. 717

12. In an action on the case against the proprietor of a stage-coach, for an injury sustained by a passenger, the declaration alleged, that the defendant was the owner of a stage-coach for the conveyance of passengers from *London* to *Blackheath*, and that the plaintiff had *agreed* to become a passenger, and that the defendant had *agreed* to receive her as such passenger, to be carried from *London* to *Blackheath*; and the evidence was, that the words "*London* to *Blackheath*" were painted on the coach-door; that the coach was licensed to run from *Charing-Cross* only; and that the plaintiff was taken up at the *Elephant and Castle* in *St. George's Fields*:—*Held*, that, as *Charing-Cross* and *St. George's Fields* are both in common parlance styled "*London*," the variance was immaterial, and the allegation sufficiently proved. *Ditcham* v. *Chivis*, *E.* 9 *G.* 4. 735

13. In trespass for breaking and entering the plaintiff's ship, and seizing and converting his goods, the defendants justified under a writ of *fieri facias*, to which the plaintiff replied *de injuriâ suâ propriâ absque residuo causæ*, and new-assigned, that the defendants entered the ship and took the goods for other purposes than those mentioned in the plea:—*Held*, that it was competent to the Judge to leave it to the jury to say, whether the goods were *bonâ fide* taken under the writ, or whether the execution was resorted to as a colour for taking them, and not to effect a levy by virtue of the writ. *Lucas* v. *Nockells*, *E.* 9 *G.* 4. 783

POLICY.

See INSURANCE.

PRACTICE.

See AFFIDAVIT TO HOLD TO BAIL.
ANNUITY.
BAIL.
COSTS.
EJECTMENT.
ERROR.
EVIDENCE.
INSOLVENT DEBTORS.
INSPECTION OF PAPERS.
JOINT-TENANTS.
PRISONER.
SET-OFF.
SHERIFF.
TRESPASS.
TROVER.
VARIANCE.
VENUE.

1. By the statute 24 *Geo.* 2, c. 48, s. 3.

the demandant in a writ of right must adjourn the tenant's essoin to the *third* return. Where, therefore, a demandant adjourned the essoin to the *second* instead of the *third* return, and the tenant entered a rule with the clerk of the essoins, that, "unless the demandant adjourned the essoin to the *third* return, a *non pros.* would be entered;" and, after the time to which the essoin ought to have been adjourned, the tenant entered a *ne recipiatur*, and signed judgment of *non pros.*, and a writ of *grand cape* was issued in the action by the demandant, on the same day, but shortly after, the judgment had been so signed:—The Court set aside the writ for irregularity. *Rowles*, demandant; *Bowly*, tenant, *M.* 8 *G.* 4. 2

2. The plaintiff described himself as *Charles Edmund* in the affidavit to hold to bail, and was named *Charles* only in the writ and declaration:—*Held*, that the defendant should have applied to set aside the writ, in the first instance, there being no affidavit of debt to warrant its being sued out; but, as the defendant had given bail, the Court ordered an *exoneretur* to be entered on the bail-piece. *Grindall* v. *Smith*, *M.* 8 *G.* 4. 24

3. The defendant having been arrested on a *capias*, returnable on a day certain, instead of on a general return day, and given a bail-bond to the Sheriff:—The Court refused to allow the writ to be amended, unless the plaintiff would consent to discharge the bail on the defendant's entering a common appearance. *Johnson* v. *Dobell*, *M.* 8 *G.* 4. 28

4. A motion requiring a plaintiff to give security for costs, on the ground of his being resident abroad, must be made before plea pleaded; and it seems that such security cannot be required from a foreigner, a master of a vessel trading to this country, but having no fixed residence here. *Kasten* v. *Plaw*, *M.* 8 *G.* 4. 30

5. If a cause be made a *remanet* at the Assizes, a new notice of trial is necessary if the plaintiff intend to try the cause at the following Assizes. Therefore, where notice of trial for the *Spring* Assizes had been given, and the cause made a *remanet* to the next *Summer* Assizes; and the defendant having then attended with his witnesses, and found that the cause was not set down, afterwards applied for costs to be paid by the plaintiff for not proceeding to trial:—*Held*, that he was not entitled. *Gains* v. *Bilson*, *M.* 8 *G.* 4. 87

6. The plaintiffs having been nonsuited, obtained a rule for a new trial, which was silent as to costs. The defendant, without going again to trial, gave the plaintiffs a *cognovit* to confess judgment, "and that the plaintiffs had sustained damages to the amount of one shilling, besides the costs to be taxed by the Prothonotary, and he should think the plaintiffs entitled." The Prothonotary having refused to tax the plaintiffs the costs of the nonsuit. The Court would not interfere, saying, that, as the parties, by the terms of the *cognovit*, had agreed to constitute the Prothonotary their arbitrator, they must be bound by his decision. *Elvin* v. *Drummond*, *M.* 8 *G.* 4. 88

7. A party outlawed can only appear in Court for the purpose of reversing his outlawry. Where, therefore, a defendant, the grantor of an annuity, who had been outlawed in an action in the Court of *King's Bench* for arrears, applied to this Court to set aside the securities, on

the ground of an illegality in the grant in the first instance:—*Held*, that he could not be heard. *Loukes* v. *Holbeche*, *M.* 8 *G.* 4. 126

8. The Court refused to allow the defendant, in an action of *assumpsit*, to plead the general issue and also several special pleas, that the money mentioned in the declaration was due only for differences arising out of stock-jobbing transactions; as such matter might be given in evidence under the former plea. *Rosset* v. *King*, *M.* 8 *G.* 4. 145

9. On a motion to set aside an attachment against the sheriff (the bail in the action having, by mistake, justified in the Court of *King's Bench* instead of in this Court), the affidavit stated that the application was made at the instance of the bail, and without collusion with, or indemnity from, the defendant:—The Court granted the application, but observed, that, in future, they would also require the affidavit to state it to be *at the expense* of the bail. The *King* v. The *Sheriffs of London*, *M.* 8 *G.* 4. 177

10. In an action for a libel contained in a letter written in *Buckinghamshire*, the Court allowed the *venue* to be changed from *London* to that county, on the usual affidavit that the plaintiff's *cause* of action (if any) arose there, it not appearing that the letter was published or circulated in a different county; and —*Held*, that the affidavit was sufficient, although the declaration contained counts for slander, as well as for the libel. *Tallent* v. *Morten*, *H.* 8 & 9 *G.* 4. 188

11. The plaintiff having commenced an action against the defendant, it was agreed in writing that he should discontinue it, and the defendant engaged to pay the legal costs incurred by the plaintiff in the suit, as between party and party. In an action to recover the amount of such costs after taxation, it was averred in the declaration, that the plaintiff had discontinued the action:—*Held*, that such averment could not be supported without proof of a rule to discontinue. *Fanshawe* v. *Heard*, *H.* 8 & 9 *G.* 4. 191

12. The defendants, being bankrupt, were sued, and suffered judgment by default in *Trinity* Term, and final judgment was entered up, and execution issued thereon, in *Michaelmas* Term following. On the 13th *November* in that Term, the defendants obtained their certificate, and, *on the same day*, the sheriff's officer levied, and he, notwithstanding a notice that the defendant's certificate had been allowed, being about to sell the goods seized, the defendants paid the amount of the debt and costs into Court, under a Judge's order, to abide the event of a motion. On application by the defendants to have the money paid out to them, the Court refused to interfere; but left the parties to their *audita querela*; although it was insisted, that, by the 6 *Geo.* 4, c. 16, s. 126, the *goods* as well as the *persons* of bankrupts are protected. *Hanson* v. *Blakey* *H.* 8 & 9 *G.* 4. 261

13. To a declaration in debt, containing several common counts, and concluding "to the plaintiff's damage of 10*l.*," the sum demanded at the commencement being 33*l.*, the defendant pleaded—that he did not owe the plaintiff the said sum of 10*l.* *above demanded*, or any part thereof:—The plaintiff having signed judgment as for want of a plea, the Court set it aside without costs, the defendant undertaking to bring no action. *Edgington* v. *Town*, *H.* 8 & 9 *G.* 4. 276

14. A person was arrested within the

liberty of the *Tower* of *London*, by an officer of the Sheriff of *Middlesex*, under a writ of *capias* without a *non omittas* clause; and gave a bail-bond:—The Court refused to order it to be delivered up to be cancelled. *Bell* v. *Jacobs*, *H.* 8 & 9 *G.* 4. 309

15. The defendant was arrested in the *Palace Court* for 19*l.*, and removed the cause by *habeas* to this Court. The plaintiff recovered 2*l.* On motion by the defendant for his costs, under the statute 43 *Geo.* 3, c. 46, s. 3:—The Court held, that, the action having been *brought* in the *Palace Court*, they could not interfere. *Costello* v. *Cawley*, *H.* 8 & 9 *G.* 4. 315

16. In an action against the drawer of a bill of exchange, he pleaded the delivery of twenty pipes of Port wine in satisfaction:—The Court refused to allow the plaintiffs to sign judgment as for want of a plea, although it was sworn that the plea was altogether false. *Smith* v. *Backwell*, *H.* 8 & 9 *G.* 4. 338

17. On moving for a rule to plead several matters, the substance of the pleas must be stated to the Court —*Per* Mr. Justice *Park*, in *Smith* v. *Backwell*, *H.* 8 & 9 *G.* 4. 338

18. Whereas, great expense is often unnecessarily incurred in making up demurrer-books, from setting forth those parts of the pleadings to which the demurrers do not apply: It is therefore ordered, that, from and after the end of this present *Hilary* Term, when there shall be a demurrer to part only of the declaration, or other or subsequent pleadings, those parts only of the pleadings to which such demurrer relates, shall be copied into the demurrer-books; and, if any other parts shall be copied therein, the Prothonotary shall not allow the costs thereof on taxation, either as between party and party, or attorney and client. *Reg. Gen. H.* 8 & 9 *G.* 4. 401

19. The plaintiffs had applied for and obtained a writ of *mandamus*, under the statute 13 *Geo.* 3, c. 63, s. 44, for the examination of witnesses in *India*, and the writ and depositions were returned to this country; but the defendants did not join in the application for the writ, nor examine or cross-examine witnesses under it; and the plaintiffs obtained a verdict:—*Held*, that they were not entitled to the costs attending the writ, or of the office copies of the depositions. *Fairlie* v. *Parker*, *E.* 9 *G.* 4. 438

20. Bail in error required by the statute 6 *Geo.* 4, c. 96, s. 1 (which was passed to prevent frivolous writs of error), cannot be dispensed with, although there be error in form on the face of the record. *Wadsworth* v. *Gibson*, *E.* 9 *G.* 4. 501

21. In an action by the assignees of a bankrupt, a clerk of the defendant's attorney delivered a plea of the general issue, at the office of the plaintiff's attorney, without a notice to dispute the bankruptcy, as required by the statute 6 *Geo.* 4, c. 16, s. 90. On the same day, and before the time for pleading had expired, the clerk called again and took away the plea, saying that there was a mistake in it; and shortly afterwards he delivered another plea with the notice attached:—*Semble*, such notice is insufficient. *Lawrence* v. *Crowder*, *E.* 9 *G.* 4. 511

22. A plaintiff being charged in execution, for costs on a verdict obtained by three several defendants, two of them signed a note for his sixpences, and the attorney who conducted the cause signed for the third, who was abroad, but without any authority from him:—*Held*,

that such note was insufficient, as the authority of the attorney determined on final judgment being signed. *Macbeath* v. *Cooke*, *E.* 9 *G.* 4. 513

23. A *British* consul at a foreign port has no authority, under the statute 6 *Geo.* 4, c. 87, s. 20, to administer an oath of the acknowledgment of a party levying a fine. *Hutchinson*, *Ex parte*, *E.* 9 *G.* 4. 559

24. The Court allowed a writ of *distringas* to be sued out under the statute 7 & 8 *Geo.* 4, c. 71, s. 5, on an affidavit of the Sheriff's officer, that he could not serve the defendant personally at his house; that he believed that he kept out of the way to avoid being served; and that his son told him he had left home for that purpose. *Turner* v. *Smith*, *E.* 9 *G.* 4. 557

25. To a declaration in *assumpsit*, containing a count on a bill for 857*l.* 10*s.*, with a count for goods sold, and the usual money counts, the defendant pleaded—as to the *second* and subsequent counts, except as to the sum of 857*l.* 10*s.*—*non assumpsit*; and—as to the said sum of 857*l.* 10*s.*—that, after the making of the promises, and before the commencement of the suit, he drew a bill on *F. L. & Co.* for that sum, and indorsed it to the plaintiffs, to whom the defendant was still liable on it; and—as to the promise in the *first* count mentioned—that, before the said bill became due, the plaintiffs indorsed it to third persons, to whom the defendant was still liable. On an affidavit that the plea was *false*:—The Court ordered it to be struck out, unless the defendant would consent to withdraw it, and undertake to plead issuably within *two* days, and to take short notice of trial for the Sittings after the Term. *Jones* v. *Studd*, *E.* 9 *G.* 4. 643

26. The defendant, an uncertificated bankrupt at the time of his arrest, put in bail, and pleaded the general issue, and afterwards delivered a plea of his bankruptcy and certificate *puis darrein continuance*, on which the plaintiff withdrew the record, and countermanded notice of trial, and the defendant, after rule to reply, signed judgment of *nonpros* and taxed his costs:—The Court ordered the proceedings on the judgment to be stayed, *without costs*. *Baker* v. *Morrey*, *M.* 8 *G.* 4. 138

PRINCIPAL AND AGENT.

See AGENT.

PRISONER.

1. A plaintiff being charged in execution, for costs on a verdict obtained by three several defendants, two of them signed a note for his sixpences, and the attorney who conducted the cause signed for the third, who was abroad, but without any authority from him:—*Held*, that such note was insufficient, as the authority of the attorney determined on final judgment being signed. *Macbeath* v. *Cooke*, *E.* 9 *G.* 4. 513

2. A defendant in execution on a *ca. sa.* issued upon a judgment obtained against him, applied to be discharged. The plaintiff had become bankrupt, and died intestate. His assignees, and his widow (who administered), both disclaimed having any interest in the damages awarded, or in the subject-matter of the suit; but it did not appear that either of them had actually assented to the discharge:—The Court refused to interfere, the legal right to discharge him being in the administratrix. *Fothergill* v. *Walton & Rondeau*. 743

PROCESS.

See PRACTICE.

PROMOTIONS, 1, 179.

PROVISIONAL ASSIGNEE.

See INSOLVENT DEBTORS.

PUBLIC LIBRARIES.

See LITERARY PROPERTY.

PUIS DARREIN CONTINUANCE.

See PRACTICE, 26.

RECOVERY.

See FINE.

1. In a recovery, the acknowledgment of the first vouchee was taken at *Calcutta*, 16th *January*, 1827, and the commissioners named in the *dedimus* had omitted to indorse the return thereon, and the word "sixteenth" was written on an erasure in the jurat of the affidavit of the commissioners, of the acknowledgment of the warrant of attorney. The second vouchee, who was tenant for life, died on the 5th *February*, 1827:—The Court allowed the returns of the writ of entry and summons to be abridged to three returns inclusive, instead of four as required by the stat. 24 *G.* 2, c. 48, s. 8. *Still*, demandant; *Raymond*, tenant; *Law*, vouchee, *M.* 8 *G.* 4. 136

2. The Court refused to allow the original writ and subsequent proceedings in a recovery to be amended, by substituting therein "*Lancashire*" for "*Berkshire*," although it was sworn that the parties had no property in the latter county, and that the premises intended to be passed were wholly situate in the former. *Dolling*, demandant; *Rice*, tenant; *Euston*, vouchee, *M.* 8 *G.* 4. 178

REGULA GENERALIS.

1. Whereas, great expense is often unnecessarily incurred in making up demurrer-books, from setting forth those parts of the pleadings to which the demurrers do not apply: It is therefore ordered, that, from and after the end of this present *Hilary* Term, when there shall be a demurrer to part only of the declaration, or other or subsequent pleadings, those parts only of the pleadings to which such demurrer relates, shall be copied into the demurrer-books; and, if any other parts shall be copied therein, the Prothonotary shall not allow the costs thereof on taxation, either as between party and party, or attorney and client. *H.* 8 & 9 *G.* 4. 401

RELEASE.

See EVIDENCE, 6.
EXECUTOR, 1.

REMANET.

See PRACTICE, 5.

REPLEVIN.

See DISTRESS.
JOINT-TENANTS.

REPLEVIN-BOND.

1. In an action of replevin, it was agreed between the plaintiff and defendant, *without the knowledge or concurrence of the sureties in the replevin-bond*, that the cause, and all matters in difference between them, should be referred to an arbitrator, *and that the replevin-bond should stand as a security for such*

sum as should be found to be due:—Held, that the sureties were discharged. *Archer* v. *Hale*, *H.* 8 & 9 *G.* 4. 285

2. A plaintiff in replevin having taken no proceedings in the suit for more than a year and a half after entering his plaint in the county court:—*Held*, to amount to a breach of the condition of the replevin-bond, to prosecute the suit with effect and without delay; although judgment of *nonpros* had not been signed by the defendant. *Axford* v. *Perrett*, *E.* 9 *G.* 4. 470

RE-SALE.

See VENDOR AND PURCHASER.

RIGHT, WRIT OF.

1. By the statute 24 *Geo.* 2, c. 48, s. 3, the demandant in a writ of right must adjourn the tenant's essoin to the *third* return. Where, therefore, a demandant adjourned the essoin to the *second* instead of the *third* return, and the tenant entered a rule with the clerk of the essoins, that, "unless the demandant adjourned the essoin to the *third* return, a *non pros.* would be entered;" and after the time to which the essoin ought to have been adjourned, the tenant entered a *ne recipiatur*, and signed judgment of *non pros.*, and a writ of *grand cape* was issued in the action by the demandant, on the same day, but shortly after, the judgment had been so signed:—The Court set aside the writ for irregularity. *Rowles*, demandant; *Bowly*, tenant, *M.* 8 *G.* 4. 2

RULE TO PLEAD.

See PRACTICE, 17.

SCOTCH DECREE.

See ASSUMPSIT, 1.
FOREIGN JUDGMENT.

SECURITY FOR COSTS.

See COSTS, 1.
PRACTICE, 4.

SEISIN.

See PLEADING, 9.

SERVANT.

See MASTER AND SERVANT.

SET-OFF.

1. Where an action had been brought, and damages recovered by the defendant against the plaintiff, and another action had been brought, and damages recovered by the plaintiff against the defendant and three others for a trespass, in which latter action, the defendant, who was the plaintiff in the former action, was the only substantial defendant (he having indemnified the other three):—The Court allowed the damages and costs of the first action to be set off against the damages and costs in the second. *Bourne* v. *Bennett and Others*, *M.* 8 *G.* 4. 141

2. Where a party has a right to sue on a policy in *his own name*, and has also *a lien* on the goods insured thereby, he may set off the amount of a loss incurred before the arrival of the goods, in an action for premiums brought by the assignees of the under-writer who subscribed the policy, and who became bankrupt since the loss. Therefore, an insurance broker having been sued by assignees of a bankrupt, for premiums received by him on policies subscribed by the bankrupt:—

Held, that the defendant might set off a loss on goods in one of those policies effected in his own name, by the order of his principals, although the goods belonged to the principals, the broker having a *lien* on them. *Davies* v. *Wilkinson*, *E.* 9 *G.* 4. 502

SHAM PLEA.

See PLEADING, 10.

SHERIFF.

See ESCAPE.
PLEADING, 6.
PRACTICE, 9, 12.
TROVER, 3, 5.

1. On a motion to set aside an attachment against the Sheriff (the bail in the action having, by mistake, justified in the Court of *King's Bench* instead of in this Court), the affidavit stated that the application was made at the instance of the bail, and without collusion with, or indemnity from, the defendant:—The Court granted the application, but observed, that, in future, they would also require the affidavit to state it to be *at the expense* of the bail. The *King* v. The *Sheriff of London*, *M.* 8 *G.* 4. 177

SHIPPING.

See CARRIER, 2.

SLANDER.

See LIBEL, 2.
PRACTICE, 10.

SPRING-GUNS.

See ACTION ON THE CASE, 1.

STAGE-COACH.

See ACTION ON THE CASE, 2.

STATUTE, CONSTRUCTION OF.

See ACT OF PARLIAMENT.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES CITED OR COMMENTED ON.

James I.

21. *c.* 16. Limitations. 487

William III.

4 & 5. *c.* 18. *s.* 3. Outlawry. 135
8 & 9. *c.* 11. *s.* 2. Costs. 140
8 & 9. *c.* 11. *s.* 8. Assignment of Breaches. 177

George I.

21. *c.* 3. Affidavit to hold to Bail. 280

George II.

5. *c.* 30. *s.* 24. Bankrupt. 597
7. *c.* 8. Stock-Jobbing. 145
19. *c.* 37. *s.* 1. Insurance. 493
24. *c.* 44. *s.* 1. Notice of Action. 346
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George III.

13. *c.* 63. *s.* 44. Mandamus. 438
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43. *c.* 46. *s.* 3. Costs. 315, 355
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George IV.

1. *c.* 119. *s.* 10. Insolvent Debtor.

3. *c.* lvii. Private Act. 490
6. *c.* 16. *ss.* 54 & 55. Bankrupt *(Annuity.)* 574
6. *c.* 16. *s.* 90. Bankrupt *(Notice to dispute.)* 511
6. *c.* 16. *s.* 92. Bankrupt *(Trover.)* 448
6. *c.* 16. *s.* 126. Bankrupt *(Trover.)* 261
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6. *c.* cxxxv. Private Act. 490
7. *c.* 57. *s.* 11. Insolvent Debtor. 19
7 & 8. *c.* 18. Spring-guns. 621
7 & 8. *c.* 71. *s.* 5. *Distringas.* 557

STAYING PROCEEDINGS.

See TROVER, 1.
PRACTICE, 26.

STOCK-JOBBING.

See PLEADING, 4.

STOPPAGE IN TRANSITU.

1. Goods were shipped on the 5th *April*, 1824, by *W. & Co.*, for one *Gilbert*, on board a vessel addressed to the defendant's wharf. An invoice of the goods was sent to *Gilbert*, stating them to be bought and shipped for him and on his account and risk, and in the ship's manifest they were marked to be delivered "to order." The vessel arrived at the wharf on the 12th, but the goods were not landed. On the 10th, *Gilbert* committed an act of bankruptcy, whereupon a commission was issued against him on the 14th. On the 17th the goods were claimed by a person on behalf of the consignors; and on the 19th, the messenger under the commission produced the invoice that had been sent to *Gilbert*, and demanded the goods. The defendant delivered them to the consignors' agent; and the assignees sued him in *trover*:—*Held*, that the *transitus* was not at an end, and that the consignors of the goods had a right to stop them. *Tucker* v. *Humphery*, *H.* 8 & 9 *G.* 4. 378

2. A dealer in *London* ordered goods of the plaintiff, a merchant at *Edinburgh*. The goods were shipped, and invoices sent to the vendee, which he received on the 29th *October*. Part of the goods arrived at a wharf in *London* on the 2d *November*, and the remainder on the 4th; the whole were landed on the 6th. On the 2d, the vendee, being insolvent, told his clerk that he would not receive the goods, and desired him to direct one *F.*, an attorney, to cause them to be stopped for the vendor. The attorney, accordingly, on the 3d *November*, gave notice to the wharfinger not to deliver the goods which had then arrived; and, on the 4th, wrote to the vendor to inform him of the stoppage. On the 6th, the vendor's agent returned an answer, requesting the attorney also to stop the goods that arrived on the 4th, which he accordingly did verbally. The agent, on the same day, wrote to the wharfinger, confirming the act of the attorney. On the 7th, the goods were seized by the sheriff, under an execution against the consignee, and afterwards sold:—*Held*, that the vendor was entitled to recover the value of the goods in an action of *trover* against the sheriff, as the contract between the vendor and the vendee was rescinded before the right of the execution-creditor had intervened;—that the *transitus* was not at an end on the arrival of the goods at the wharf;—and that the vendor's adoption of the act of the attorney for

the vendee, before the seizure under the execution, amounted to an assent to the repudiation of the contract. *Bartram* v. *Farebrother*, *E.* 9 *G.* 4. 515

SUBMISSION.

See ARBITRATION.

SUPERSEDEAS.

See BANKRUPT, 6.

SUPPLEMENTAL AFFIDAVIT.

See AFFIDAVIT TO HOLD TO BAIL, 1.

SURETY.

See ANNUITY.
ARBITRATION, 1.
REPLEVIN.

SURGEON.

1. A member of the *Royal College of Surgeons* cannot sue for medicines furnished, unless he be also certificated by the *Apothecaries' Company*.

Semble, that a surgeon may recover for such medicine as is necessarily administered in a *surgical* case. *Allison* v. *Haydon*, *E.* 6 *G.* 4. 588

TOLLS.

See ACT OF PARLIAMENT, 2.

TOWER OF LONDON.

See PRACTICE, 14.

TRESPASS.

1. To a joint action of trespass against four defendants, one of them pleaded a *misnomer* in abatement, and concluded by praying judgment "*of the writ, and that the same may be quashed, &c.*":—*Held*, bad on general demurrer, as the *misnomer* only operated to abate the writ *as to the party misnamed*. *Wade* v. *Stiff*, *M.* 8 *G.* 4. 26

2. By an act of Parliament (47 *G.* 3, c. 72) for supplying the inhabitants of certain parishes with water, the Company were empowered (sect. 32) to make and maintain waterworks, aqueducts, &c. &c.; and, for the purpose of distributing the water to the different inhabitants, to dig and break up the soil and pavement of any of the roads, highways, *footways*, commons, streets, lanes, alleys, passages, *and public places*, within and near to the said parishes; and by the 34th section, it was provided, that the Company should not make any aqueduct, &c. across or over, or enter upon, the *private* lands or grounds of any person, *without the consent* of the owner or occupier; or into or upon any common, without the consent of the lord of the manor:—*Held*, that the word *footways*, in the 32nd section, must be confined to footways before houses, or in public places, and not extended to footways running across inclosed fields. *Scales* v. *Pickering*, *H.* 8 & 9 *G.* 4. 195

3. In trespass for breaking and entering the plaintiff's ship, and seizing and converting his goods, the defendants justified under a writ of *fieri facias*, to which the plaintiff replied *de injuriâ suâ propriâ absque residuo causæ*, and new-assigned that the defendants entered the ship and took the goods for other purposes than those mentioned in the plea:—*Held*, that it was competent to the Judge to leave it to the Jury to say, whether the

goods were *bonâ fide* taken under the writ, or whether the execution was resorted to as a colour for taking them, and not to effect a levy by virtue of the writ. *Lucas* v. *Nockells*, *E.* 9 *G.* 4. 783

4. A ship-owner, by charter-party, let his ship for a year, to take any goods on board which the freighter should tender, and the freight was to be paid ten days after the delivery of the cargo:—*Held*, that the owner had sufficient possession of the ship to maintain trespass against wrong-doers for entering her, although he had no lien on the cargo for the freight. *Ibid.*

TROVER.

See BANKRUPT, 8.
CARRIER, 1, 3.

1. In trover for several letters, one of which was addressed to the plaintiff, and the others to *N. H.*, or to the plaintiff, if *N. H.* had left *England*, the Court ordered the proceedings to be stayed, on the defendant's delivering up to the plaintiff the letter addressed to him, and paying the costs of the action and application, if the plaintiff would accept the same in discharge of the action; but ordered, that, if he would not accept that letter, and did not recover damages for the others, or should recover nominal damages only for that offered to be delivered up, he was to pay the costs of the action. *Earle* v. *Holderness*, *H.* 8 & 9 *G.* 4. 254

2. Goods were shipped on the 5th *April*, 1824, by *W. & Co.*, for one *Gilbert*, on board a vessel addressed to the defendant's wharf. An invoice of the goods was sent to *Gilbert*, stating them to be bought and shipped for him and on his account and risk, and in the ship's manifest they were marked to be delivered "to order." The vessel arrived at the wharf on the 12th, but the goods were not landed. On the 10th, *Gilbert* committed an act of bankruptcy, whereupon a commission was issued against him on the 14th. On the 17th the goods were claimed by a person on behalf of the consignors; and, on the 19th, the messenger under the commission produced the invoice that had been sent to *Gilbert*, and demanded the goods. The defendant delivered them to the consignors' agent; and the assignees sued him in *trover*:—*Held*, that the *transitus* was not at an end, and that the consignors of the goods had a right to stop them. *Tucker* v. *Humphery*, *H.* 8 & 9 *G.* 4. 378

3. A dealer in *London* ordered goods of the plaintiff, a merchant at *Edinburgh*. The goods were shipped, and invoices sent to the vendee, which he received on the 29th *October*. Part of the goods arrived at a wharf in *London* on the 2d *November*, and the remainder on the 4th; the whole were landed on the 6th. On the 2d, the vendee, being insolvent, told his clerk that he would not receive the goods, and desired him to direct one *V.*, an attorney, to cause them to be stopped for the vendor. The attorney, accordingly, on the 3d *November*, gave notice to the wharfinger not to deliver the goods which had then arrived; and, on the 4th, wrote to the vendor to inform him of the stoppage. On the 6th, the vendor's agent returned an answer, requesting the attorney also to stop the goods that arrived on the 4th; which he accordingly did verbally. The agent, on the same day, wrote to the wharfinger, confirming the act of the attorney. On the 7th, the goods were seized by the sheriff under an execution against

the consignee, and afterwards sold: —*Held*, that the vendor was entitled to recover the value of the goods in an action of *trover* against the sheriff, as the contract between the vendor and the vendee was rescinded before the right of the execution-creditor had intervened;—that the *transitus* was not at an end on the arrival of the goods at the wharf;—and that the vendor's adoption of the act of the attorney for the vendee, before the seizure under the execution, amounted to an assent to the repudiation of the contract. *Bartram* v. *Farebrother*, *E.* 9 *G.* 4. 515

4. The plaintiffs procured for one *J. E.* the loan of 1000*l.*, on a bill for 3500*l.*, accepted by the defendant. With the consent of *P.*, the lender, and *J. E.*, the bill was left in the hands of the plaintiffs, as security for the repayment of the money advanced. *J. E.*, being indebted to the plaintiffs, afterwards wrote to them as follows: "The bill of 3500*l.* you will please to hold, subject to the 1000*l.*, as also, for any advances or law expenses you have against me." The defendant fraudulently obtained the bill out of the custody of the plaintiffs. *P.* sued him in trover, and, by the award of an arbitrator, recovered the sum he advanced: — *Held*, that, notwithstanding the recovery by *P.*, the plaintiffs were also entitled to recover in trover against the defendant, the amount due to them from *J. E.* *Knight* v. *Legh*, *E.* 9 *G.* 4. 528

5. If a sheriff take goods in execution after an act of bankruptcy committed by the party against whom such execution is sued out, the sheriff is liable to the assignees in trover, although he had no notice of the act of bankruptcy, and although the commission did not issue until nearly two months after the execution,—on the ground that the property of the bankrupt vests in his assignees, from the time of the act of bankruptcy, by relation;—and this although the goods seized were not removed from the premises, but were only detained there until the amount directed to be levied was paid by the bankrupt to the sheriff. *Price* v. *Helyar*, *E.* 9 *G.* 4. 541

6. *A.* purchased goods of *B.* for *C.*, who gave *A.* his acceptance for their amount. *C.* having become bankrupt, *A.* proved the acceptance under the commission, and afterwards returned the goods to *B.*, on which *C.'s* acceptance was destroyed. In an action of trover by the assignees of *C.*:—*Held*, that the Jury were warranted in finding that *A.* & *B.* had been guilty of a joint conversion. *Robson* v. *Alexander*, *E.* 9 *G.* 4. 448

TRUSTEES.

See DEVISE.

UNDERTAKING.

See ASSUMPSIT, 3.

UNDER-WRITER.

See INSURANCE.

VARIANCE.

See PRACTICE, 2.
JUSTICE OF THE PEACE.

1. In an action for a breach of promise of marriage, the promises declared on were,—*first*, to marry on request;—*secondly*, the like, assigning for breach, that the defendant had married another;—*thirdly*, to marry within a reasonable time; —and, *lastly*, to marry generally. The proof was, that the defendant had said, that he would marry the

plaintiff in *July*:—*Held*, that, notwithstanding this variance, the Jury were warranted by the evidence in inferring a promise to marry generally; and that the plaintiff was entitled to recover on the last count of the declaration. *Phillips* v. *Crutchley*, *H.* 8 & 9 *G.* 4. 239

2. The plaintiff, in the *first* and *third* counts of his declaration, alleged, that, at the time of making the agreement with the defendant, he was possessed of a house for a certain term of years, *to expire on the 25th December*, 1856; and, in the *second*, that he was entitled to the term *under and by virtue of a certain contract*. The proof was, that the plaintiff was possessed of a term of *twelve* years only; and there was *no* contract or agreement under which he was at that time entitled to an extension of the term:—*Held*, that this was a fatal variance, although it appeared that the plaintiff had since become possessed of a lease to expire in *December*, 1856. *Routledge* v. *Grant*, *E.* 9 *G.* 4. 717

3. In an action on the case against the proprietor of a stage-coach, for an injury sustained by a passenger, the declaration alleged, that the defendant was the owner of a stage-coach for the conveyance of passengers from *London* to *Blackheath*, and that the plaintiff had *agreed* to become a passenger, and that the defendant had *agreed* to receive her as such passenger, to be carried from *London* to *Blackheath*; and the evidence was, that the words "*London* to *Blackheath*" were painted on the coach-door; that the coach was licensed to run from *Charing-Cross* only; and that the plaintiff was taken up at the *Elephant and Castle* in *St. George's Fields*:—*Held*, that, as *Charing-Cross* and *St. George's Fields* are both in common parlance styled "*London*," the variance was immaterial, and the allegation sufficiently proved. *Ditcham* v. *Chivis*, *E.* 9 *G.* 4. 735

VENDOR AND PURCHASER.

See TROVER, 2, 3.

1. The defendant offered to purchase of the plaintiff the lease of a house, requiring possession to be given *on the 25th July*, and a definitive answer within six weeks. The plaintiff accepted the proposal, offering possession *on the 1st August*. The defendant afterwards, and before the six weeks had expired, retracted his offer:—*Held*, that the plaintiff's acceptance of the defendant's offer not being in the terms proposed, and no proper acceptance of it having been given before the defendant withdrew, the agreement was vacated. *Routledge* v. *Grant*, *E.* 9 *G.* 4. 717

2. A broker delivered to the vendor bought and sold notes, written on one sheet of paper, and the day for payment of the goods was inserted at the end of the bought note only, but in those made out for the purchasers, the day was inserted at the end of the bought as well as of the sold note:—*Held*, that, as the bought and sold notes delivered to the vendor were both written on one sheet of paper, the whole must be taken as forming one contract; and, consequently, that there was no variance. *Maclean* v. *Dunn*, *E.* 9 *G.* 4. 761

3. If a purchaser refuse to accept goods bargained for, the vendor may re-sell them, and recover against the purchaser the amount of the loss on such re-sale. *Ibid.*

VENUE.

1. In an action for a libel contained

in a letter written in *Buckinghamshire*, the Court allowed the *venue* to be changed from *London* to that county, on the usual affidavit that the plaintiff's *cause* of action (if any) arose there; it not appearing that the letter was published or circulated in a different county: and —*Held*, that the affidavit was sufficient, although the declaration contained counts for slander, as well as for the libel. *Tallent* v. *Morten*, *H.* 8 & 9 *G.* 4. 188

WARRANT.

See JUSTICE OF THE PEACE.

WATER-WORKS COMPANY.

See ACT OF PARLIAMENT.

WILL.

See DEVISE.
EXECUTORS.

WITNESS.

See EVIDENCE.

1. A woman who lives with a man, uses his name, and passes as his wife, is a competent witness on his behalf, in an action brought against him; as the mere circumstance of cohabitation only goes to her credit, not to her competency.. *Batthews* v. *Galindo*, *E.* 9 *G.* 4. 505
2. In order to shew a witness interested, it is necessary to prove that he has an *immediate* interest in the event of the suit, or must derive a *certain* benefit from its determination one way or the other. Therefore, in trover for a barge which the plaintiffs claimed under a purchase from one *B.*, and which the defendants also claimed under a purchase from one *W.*, who they alleged to have bought it from *B.*, *B.* was called as a witness, when, on an objection being taken to his competency, on the ground of interest, he was released by joint and several releases from the defendants and *W.*:—*Held*, that the release by *W.* rendered *B.* a competent witness. *Radburn* v. *Morris*, *E.* 9 *G.* 4. 648

WRIT OF ENTRY.

See PLEADING, 3.

WRIT OF RIGHT.

See PRACTICE, 1.

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